sufficient to serve its necessary purpose on appeal is ultimately a matter of law for the appellate courts. State v. Perry, 136 Wis. 2d 92, 97, 401 N.W.2d 748 (1987). The circuit court's decision of whether to grant a new trial due to lack of a transcript is discretionary. Id. The circuit court erroneously exercises its discretion when it commits an error of law or does not base its decision on the facts of the record. State v. Raye, 2005 WI 68, ¶16, 281 Wis. 2d 339, 697 N.W.2d 407.

RELEVANT CASES

State v. DeLeon, 127 Wis. 2d 74, 377 N.W.2d 635 (Wis. Ct. App. 1985)

In DeLeon, the court of appeals clarified the proper procedure for reconstructing missing parts of a trial record. First, an appellant must claim some reviewable error occurred during the missing portion of the trial. DeLeon, 127 Wis. 3d at 80. If the circuit court determines that the appellant has at least a facially valid claim of error, then the circuit court must decide whether the missing portion of the transcript can be reconstructed, based on factors such as the availability of witnesses, the availability of counsel, and the time elapsed. Id. at 81. The circuit court may find that the attempt at reconstruction is insurmountable, in which case a new trial will be ordered. Id. If the circuit court determines that it can attempt reconstruction, the appellant must prepare an affidavit, to which the respondent should file objections and amendments. Alternatively, the parties can file a joint stipulation. Id. at 82. If there is no dispute, the circuit court may settle and approve the substituted record. Id. If disputes remain, the circuit court can resolve them, relying on affidavits and hearings. Id. This resolution must reflect what took place during the trial to the same level of proof required during trial (i.e. beyond a reasonable doubt for criminal cases) and if the circuit court is unable to make the requisite finding it must order a new trial. Id.

* Neither party petitioned this court for review.

State v. Perry, 136 Wis. 2d 92, 401 N.W.2d 748 (1987)

In Perry, notes prepared by a reporter during a trial were lost in the mail, which resulted in the testimony of all defense witnesses and the prosecutor's closing argument being excluded from the transcript. Perry, 136 Wis. 2d at 96-97. Perry moved for a new trial, and the circuit court did not grant the motion, holding that the available parts of the transcript were sufficient for his appeal. Id. at 97. The court of appeals reversed, and this court granted review.

This court recognized that in order for a criminal appeal to be meaningful, Wisconsin and federal law require that the defendant be furnished with a full transcript or a functionally equivalent substitute that, beyond a reasonable doubt, portrays what happened at trial. Id. at 99. Regardless, the standard for properly determining the sufficiency of a transcript for appeal is for error to be alleged in the missing parts of the transcript. Id. at 108. All that an appellant needs to allege is that "there is some likelihood that the missing portion would have shown an error that was prejudicial." Id. at 105. The appellant does not need to prove that the error was prejudicial. Id. This court proclaimed that it followed DeLeon, but used its discretion to decline to follow every procedure set forth in DeLeon to attempt to reconstruct the record. Because there were "significant" portions of the record missing in Perry, this court determined that parties did not need to follow procedures "superfluous and meaningless" to the factual circumstances of the record.

This court affirmed, holding that Perry had "done everything that reasonably could be expected in order to perfect his appeal," and concluded that the case was unreviewable based on the transcript. Id. at 108.

State v. Knight, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

After defendant was convicted SPD appointed counsel to help him pursue postconviction relief. Knight, 168 Wis. 2d at 513. The attorney filed a timely appeal, and the circuit court's ruling was approved per curiam. Id. The attorney did not file a petition for review to this court and took no further action in the case. Id. SPD appointed a second attorney to represent Knight in further proceedings, and this attorney filed a motion for postconviction relief pursuant to Wis. Stat. § 974.06, alleging ineffective assistance of appellate counsel. Id. The motion alleged that the earlier appeal was incomplete and that Knight's trial counsel had gone against his wishes in failing to petition this court for review. Id. at 513-14. The circuit court denied Knight's motion for postconviction relief, holding that it lacked the authority under § 974.06 to grant the relief requested. Id. at 511.

This court held that the appropriate vehicle for relief for a criminal defendant who asserts his appellate counsel provided ineffective assistance is a habeas petition, and the proper forum is the court that considered the appeal. Id. at 512-13.

State ex rel. Kyles v. Pollard, 2014 WI 28, 354 Wis. 2d 626, 847 N.W.2d 805.

Kyles filed a petition with the court of appeals for a writ of habeas corpus seeking to extend the deadline for him to file a notice of intent to pursue postconviction relief. The court of appeals rejected the petition after determining that Kyles should have filed with the circuit court. Kyles, 354 Wis. 2d 626, ¶1. This court reversed, holding that a criminal defendant must file a habeas petition with the court of appeals to obtain relief based on trial counsel's ineffectiveness in failing to file a timely notice of appeal. Id., ¶3. This court reasoned that the circuit court did not have the authority to extend the deadline to file a notice of intent to pursue postconviction relief, which is a court of appeals procedure. Id.

ARGUMENTS AND ANALYSIS

Circuit Court Decision

In the circuit court, the State argued that pursuant to Perry, Pope had to assert a claim of error. The State also asserted the affirmative defense of laches. Pope argued that the State waived the laches defense when it stipulated to a reinstatement of appellate rights. The State responded that the attorney general would not have signed the stipulation if the State knew that there was no transcript. The State also asserted that the delay was unreasonable and prejudicial.

The court ordered a new trial, reasoning that Pope was entitled to a meaningful appeal, regardless of the delay, and that the lost transcript was not Pope's fault. The court also rejected the State's laches defense on the grounds that the State should have known that there would be no transcript, given this court's rule allowing destruction of transcripts after ten years.

Court of Appeals Decision

Applying DeLeon and Perry, the court of appeals reversed based on Pope's failure to assert a "facially valid claim of error." State v. Pope, No. 2017AP1720, unpublished slip op. (Wis. Ct. App. Nov. 13, 2018), ¶25. The court of appeals also held that by filing the statements of transcript while Pope's appeal of his § 974.06 motion was pending, Pope "represented to [that] court and the State that the only transcript that was necessary for his appeal was the sentencing transcript." Id. at ¶34. Adopting language from the Perry court, the court of appeals also held that Pope had not "done everything that could reasonably be expected in order to perfect his appeal." Id. The State briefed the laches defense issue to the court of appeals, but it did not address laches in its decision, presumably because it rejected Pope's new trial motion.

My Analysis

Pope is entitled to a new trial because the failure of his state-appointed counsel to pursue his appeal resulted in his trial transcript never being produced.

For criminal defendants in Wisconsin, the right to a meaningful appeal to the court of appeals is constitutionally guaranteed. See State v. Perry, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987); Wis. Const., Art. I, § 21(1). In order for the appeal to be meaningful, the defendant must be furnished with either a full transcript or a functional equivalent that, in a criminal case, portrays what happened in the course of the trial beyond a reasonable doubt. Perry, 136 Wis. 2d at 99. When a transcript is deficient, beyond a harmless error that will not materially affect the appeal, there usually cannot be a meaningful appeal and the proper remedy is reversal and a new trial. Id.

In DeLeon, this court found that the record had been sufficiently reconstructed to meet these standards. 127 Wis. 2d at 77. In Perry, this court found that the record had not been sufficiently reconstructed and ordered a new trial because the errors alleged by the defendant required those parts of the transcript. 136 Wis. 2d at 94. Both of these cases involved only parts of the trial transcript missing, not the entire transcript. The State argues that the preliminary evidence hearing and sentencing transcripts, along with police reports and witness statements, should be sufficient for Pope to allege error. If this court issued this sort of holding, it would retract from the meaning of a "meaningful appeal" in Wisconsin, as these pieces of the record hardly serve as a functional equivalent to a full transcript. Further, alleging errors at trial without a trial transcript would make it challenging, if not impossible, for Pope's counsel to comply with the duty to advance only claims that are warranted under existing law or established facts. See S.C.R. 20:3.1(a)(1) and (3); Wis. Stat. § 809.32.

Further, the transcript is missing because of Backes, the State, and the court system, not Pope. By precluding Pope from his constitutional right to a meaningful appeal, as the circuit court found in the evidentiary hearing for reinstatement of Pope's direct appeal rights, what Backes did is per se ineffective assistance. See Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000) ("[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal."). Backes was appointed by the SPD, which then neglected to step in and file the notice of intent to appeal when Backes

disappeared, despite Pope informing them of this issue. The court reporter destroyed the notes in accordance with a questionable Supreme Court Rule.

The majority of case law in other jurisdictions on this topic involve portions of transcripts missing, not entire transcripts.[5] The two most analogous cases that I found are Johnson v. State, 805 S.E.2d 890 (Ga. 2017) and Freeman v. United States, 60 A.3d 434, (D.C. App. 2013).

In Johnson, all of the original verbatim trial transcript materials from a six-day murder trial were destroyed in a fire at the court reporter's house. 805 S.E.2d at 891. The State ultimately provided the defendant with a fourteen-page, double spaced document purported to be a complete narrative re-creation of the trial transcript for his appeal. Missing elements of that transcript included cross examinations, evidentiary rulings (including explanations for fourteen objections by the defendant that were overruled), and testimony about the violation of a motion in limine to exclude evidence related to children being

[5] For examples of cases in other jurisdictions where new trial motions were rejected when portions of the transcript were missing, see, e.g., State v. Jones, 220 So.3d 128 (La. App. 2017) (refusing new trial for defendant because he failed to show prejudice in missing voir dire transcript); State v. Hillman, 417 S.W.3d 239 (Mo. 2013) (refusing new trial for defendant because he did not meet the burden of "exercis[ing] due diligence to correct the deficiency in the record and [alleging that] he was prejudiced by the alleged defects"); Reynolds v. State, 294 P.3d 823 (Wyo. 2012) (refusing new trial for defendant due to record being properly settled by both parties, including a detailed reconstruction submitted by the defendant); State v. DePastino, 638 A.2d 578 (Conn. 1994) (refusing new trial for defendant when notes from objections and discussions during victim's testimony went missing, although testimony itself was complete).

For examples of cases in other jurisdictions where new trial motions were granted when portions of the transcript were missing, see, e.g., State v. Yates, 821 S.E.2d 650 (N.C. Ct. App. 2018) (granting new trial to defendant when missing transcript included crucial portions of victim's testimony such as cross-examination); Johnson v. State, 524 S.W.3d 338 (Ct. App. Tex. 2018) (granting new trial to defendant when a "significant portion" of the court reporter's notes were lost by the reporter); People v. Jones, 178 Cal. Rptr. 44 (Cal. Ct. App 1981) (granting a new trial to defendant when notes from trial had been destroyed by the reporter, contrary to California law).

at the crime scene. Id. at 897. The Supreme Court of Georgia granted the defendant's new trial motion, based on the manifest inadequacy of the transcript not providing the defendant with a fair opportunity to identify trial errors. Id. This case may be distinguishable based on the transcript missing due to a random disaster, rather than the calculated action of the court, and because Johnson's postconviction proceedings were all timely. However, it is persuasive and favorable to the defendant here.

In Freeman, the defendant's appeal rights were reinstated and his murder conviction was vacated seventeen years after his trial, due to his counsel's failure to file appeal paperwork. 60 A.3d at 434-45. The defendant's transcripts were no longer available. Id. The United States moved to approve a forty-page statement of evidence and associated appendices it had created based on its trial file, the trial judge's detailed notes of motion hearings and trial proceedings, trial exhibits, jury instructions, and pleadings. Id. at 435. The defendant did not make claims of error, instead arguing that the inadequacy of the reconstructed record prevented appellate counsel from reviewing the record for possible errors and prevented the court from engaging in meaningful appellate review. Id. The D.C. Court of Appeals noted that despite an exceptionally detailed reconstruction of the record, Freeman made no attempt to identify any area of concern. While D.C. Circuit case law pointed to the inability to proffer specific prejudicial errors not being dispositive in a new trial motion, it is an important factor there in evaluating whether the lack of a verbatim transcript is prejudicial. Id. at 436. On this basis, the court affirmed the trial court's denial of the defendant's motion for a new trial. Id. at 437.

Freeman is probably the most factually similar case to this one, but it can still be distinguished on the basis of the main issue being a detailed reconstruction of the record that was acceptable based on D.C. case law. Further, the dissent in that case notably presented that the reconstructed record did not contain any record of jury selection, opening statements, or closing arguments, in addition to the inadequacy of such a brief reconstruction of an eight-day-long murder trial. The apparent inadequacy of the reconstructed transcript in Freeman suggests incompatibility with Wisconsin law, which requires a reconstructed trial record to reflect the proceedings beyond a reasonable doubt. Thus, that case should not be adopted as persuasive authority.

Overall, some of the State's most compelling persuasive authority can be distinguished both factually and based on inconsistency with Wisconsin law. Regardless, the State advances that it would be "manifestly unfair to the State, to the

victims' families, and to the interest in the finality of criminal convictions" to allow Pope to proceed to a new trial without alleging error. However, the failure of the State in this case could provide a narrow exception that would not simply open the floodgates of those serving life sentences to new trials. The bottom line here is that the State has been responsible for the most telling difficulties in this case. This court should therefore draw a narrow exception to Perry for Pope: where the entire trial transcript is missing due to ineffective assistance of counsel, a criminal defendant need not allege error in the missing transcript, and the proper remedy is a new trial. As discussed below, the State can still assert the equitable defense of laches to preclude this remedy in cases where an unreasonable delay occurred.

Pope's statements on the transcript for the appeal of his postconviction motion pursuant to Wis. Stat. § 974.06 did not bind him in all subsequent appeals.

The court of appeals' holding that Pope waived a full transcript was based on statements on the transcript that Pope filed during the appeal of his postconviction motion pursuant to Wis. Stat. § 974.06. In this pro se motion, Pope alleged that he was sentenced to life without the possibility of parole and that Backes had testified during Pope's sentencing hearing that he would file the appropriate form indicating intent to pursue postconviction relief. See R. 28:1-2. The appeal of the circuit court's decision to reject this motion did not address the merits of Pope's conviction, and the entirety of Pope's trial transcripts were not necessary to litigate that appeal. Pursuant to Wis. Stat. § 809.11(4)(b), Pope filed a statement on the transcripts, including that all necessary transcripts (referring to the sentencing transcript) were already on file for his appeal. Finances were also a likely barrier to producing unnecessary parts of the transcript, given that Pope's fees were not waived.

This court should reverse the court of appeals on this issue. It was convenient for the court of appeals to blame Pope for failing to take action on the transcript in an earlier proceeding where he did not actually need the whole transcript, had not had his transcript fees waived, and was not being represented by an attorney. However, it was not lawful. This line of argument also deflects from the central issue here: it was attorney Backes', and accordingly, the State's duty to ensure that these transcripts were produced by filing timely notice of intent to appeal.

The State cannot assert laches because it stipulated to the reinstatement of direct appeal rights, knowing that over twenty years had passed since the original trial.

In habeas cases the State bears the burden of proving the three elements of laches: whether the delay was unreasonable, whether the State acquiesced in the delay, and whether the State suffered actual prejudice from the delay. State ex rel. Coleman v. McCaughtry, 2006 WI 49, ¶2, 290 Wis. 2d 352, 714 N.W.2d 900. If the State meets the burden of proving laches, whether or not to deny relief to the habeas petitioner is left to the discretion of the court. Id., ¶17.

The circuit court rejected the State's laches defense because the State signed the stipulation reinstating Pope's direct appeal rights, and therefore acquiesced in the delay. The court noted that the State probably should have been keenly aware of the non-existence of the trial transcript, given the amount of time that passed between the trial and the reinstatement of Pope's direct appeal rights. The State is now asserting that the stipulation is invalid because of a mutual misunderstanding of material fact (referring to the lack of transcript) and, if this court adopts my recommendation for Issue 1, a change in governing law. Accordingly, the State requests that this case be remanded in order to argue laches.

Given that there is a rule to destroy transcripts after ten years, this court should agree with the circuit court that the State cannot meet the elements of laches. It was a powerful and risky move for the State to reinstate Pope's direct appeal rights after twenty years, and there was no valid reason for the State to overlook the issue of the existence of a trial transcript. The State therefore acquiesced in the delay.

While this court need not address laches, I will briefly address the other elements: unreasonable delay and prejudice. Returning to the first element of laches, the State cannot meet the burden to establish unreasonable delay. Pope signed a form acknowledging that he had to act within twenty days of his sentence in order to receive his transcripts and his right to pursue a direct appeal. However, Backes told the court that he would file these forms. Most inmates probably do not expect their attorney to forget about them, and it would be a crude reflection of the criminal justice system to require inmates to act based on this expectation. In the meantime, Pope had to write a motion on his own, using his limited knowledge of the law and the limited resources available to him in prison.[6] The

[6]This court has recognized that "the confinement of the prisoner and the necessary reasonable regulations of the prison" can make it difficult for prisoners to seek legal help or plead in

circuit court found that Pope did everything in his power over the last few decades to pursue the appeal on his own. Pope exhausted all of the options that he could reasonably find based on his own research and the advice of jailhouse lawyers. The process for reinstating direct appeal rights due to ineffective assistance of counsel was also not clarified until Kyles, and Pope filed his habeas petition within the same month of that decision. While Pope could have taken action in the ten years before the notes from his trial were destroyed, the State should not meet the burden of unreasonable delay based on this fact alone.

The State should be able to establish prejudice based on the delay, given the challenges of pursuing a new trial at this point. However, even if the State could meet all three of these elements, this court could still exercise its discretion to provide relief to Pope.

Overall, there is an insufficient legal basis for this court to void the State's stipulation reinstating Pope's direct appeal rights and remand this case to allow the State to assert laches. There is no need for this court to discuss the merits of the State's laches defense, and, even if this court does so, the remedy is ultimately discretionary.

CONCLUSION

The facts of this case are morally compelling: as a result of adopting my recommendations, a party to a double homicide may be freed. However, the law requires this court to grant a new trial for Pope. Pope would not have the right to a meaningful appeal if he had to assert a claim of error based on transcript that does not exist because the State destroyed it. This court should therefore create a narrow exception to the pleading rules in Perry: where the entire trial transcript is missing due to counsel's failure to file timely notice of intent to pursue postconviction relief, a criminal defendant need not allege a specific error. Further, Pope did not waive his right to a full transcript in submitting that he only needed a sentencing transcript for his appeal of an earlier postconviction decision that did not address the merits of his case. Finally, this court should not remand on the basis of the stipulation reinstating Pope's direct appeal rights being void.

accordance with procedural standards. "Accordingly, [this court] must follow a liberal policy in judging the sufficiency of pro se complaints filed by unlettered and indigent prisoners." State ex rel Terry v. Traeger, 60 Wis. 2d 490, 496, 211 N.W.2d 4 (1973).

Applicant Details

First Name	**Noah**
Middle Initial	**J**
Last Name	**Teixeira**
Citizenship Status	**U. S. Citizen**
Email Address	**nteixeir@masonlive.gmu.edu**
Address	**Address** Street **18 Bates St NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7756717844**

Applicant Education

BA/BS From	**University of Nevada-Reno**
Date of BA/BS	**May 2018**
JD/LLB From	**George Mason University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54701&yr=2011**
Date of JD/LLB	**May 15, 2022**
LLM From	**Georgetown University Law Center**
Date of LLM	**August 16, 2022**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**National Security Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**George Mason Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Jan, Folena
janfolena@ymail.com
Ledig, Robert
rledig@gmu.edu
571 331-1976
Pfau, Molly
Molly_Pfau@nvb.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Noah Teixeira
770 P St. NW Apt. 304, Washington, D.C. 20001
(775) 671-7844 | nteixeir@gmu.edu

April 9, 2022

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and
Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Re: Law Clerk Application

Magistrate Judge Hanes:

I write to express my interest in serving as a law clerk in your chambers for the 2022-2023 term. I am confident that my extensive legal research and writing experience make me a strong candidate.

Throughout law school, I took on diverse externships and research assistant positions, where I drafted legal documents for litigation, regulatory, and transactional matters. For example, while at the Department of Justice, I researched complex antitrust legal issues and drafted significant portions of motions that attorneys filed in federal courts. In addition, I took more than the required legal writing courses to produce academic papers for industry experts and multiple sitting U.S. Supreme Court justices. My past experiences and commitment to honing my research and writing skills will help me produce high-caliber work products for your chambers.

Additionally, I hope to clerk for you to walk in my parents' footsteps as a public servant. I saw the value of public service in my prior federal judicial externships and as an aide in the Nevada Legislature. Ultimately, my goal is to serve my country as a prosecutor with the Department of Justice in the Fraud Section. Working in your chambers will not only allow me to serve the public, but I also hope to learn from you to develop my writing and judgment skills.

Enclosed please find my resume, transcript, writing sample, letters of recommendation, and references. I look forward to meeting with you at your convenience. Thank you for your time and consideration.

Sincerely,

Noah Teixeira

Noah Teixeira

Enclosures

Noah Joseph Teixeira

(775) 671-7844 | nteixeir@gmu.edu | Washington, D.C. 20001

EDUCATION

George Mason University Antonin Scalia Law School | Arlington, Virginia — August 2019 – May 2022
Juris Doctor, **Top 15% (Cum Laude)**
Activities: National Security Journal, *Editorial Board Member;* Mentor to 1st Year Students; Business Law Society, *Member*; Moot Court Competition, *Finalist*;

University of Nevada, Reno | Reno, Nevada — August 2014 – May 2018
Bachelor of Science in Business Administration, Major – Economics, Minor – Political Science
Honors: Regents Scholar, Millennium Scholar
Activities: ASUN (Student Government), *President* and *Speaker of the Senate*; College of Business, *Senator*; Alpha Tau Omega, *Vice President*; St. Jude Up 'Til Dawn, *Recruitment Director*; Interfraternity Council; *Judicial Board Chair*

EXPERIENCE

Securities and Exchange Commission | Washington, District of Columbia — January 2022 – May 2022
Intern in the Enforcement Section
- Analyzing statements made in 10Q, 10K, 8K, and earnings calls to develop "materiality" for the purposes of 10b-5 actions.
- Applying the facts of potential enforcement actions to case law to develop legal arguments for civil action recommendations.
- Research for and draft complaints in the Third, Fourth, and Second Circuit for 10b-5 violations against executives.
- Research the Commission's subpoena power under the Exchange Act and Securities Act to aid staff in future litigation.

Antonin Scalia School of Law | Arlington, Virginia — March 2021 – Present
Research Assistant to Paolo Saguato, Member of European Securities Market Authority
- Researching GameStop instability for solutions to capital netting rules, clearinghouses, and post-trade inefficiencies.
- Drafting a white paper for publication regarding the use of distributed ledger to prevent instability in post-trade processes.

Weiner Brodsky Kider PC | Washington, District of Columbia — August 2021 – Present
Law Clerk — February 2021 – May 2021
- Advising mortgage and investment banks, finance companies, and consumer financial service providers on the laws and regulations that govern mortgage servicing, securitization, origination, HUD and GSE lenders, and FHA Insurance.
- Developing business plans, capital fundraising strategies, and fraud detection systems for *de novo* FDIC insurance applications.
- Researching for and drafting motions, discovery requests, and memos for financial institutions in ongoing and potential litigation under the False Claims Act, Equal Credit Opportunity Act, and Truth in Lending Act.
- Structuring, negotiating, and documenting asset, stock, and whole company acquisitions and dispositions for mortgage banks, investment banks, and real estate finance companies.
- Documenting and performing due diligence on the terms and conditions of a client's purchase of a major share in an investment bank.
- Drafting non-disclosure agreements in support of a mortgage bank's acquisition of an FDIC-insured institution.

Department of Justice | Washington, District of Columbia — August 2021 – November 2021
Intern in the Antitrust Section
- Reviewed billion-dollar mergers through confidential financial and business strategy documents to later draft either a recommendation for DOJ investigation or a no-interest memorandum to let the merger go forward.
- Researched for and drafted memos on issues under the Sherman, Clayton, and California Unfair Competition Act.
- Directed interviews with competitors and customers of parties that were seeking DOJ merger approval.
- Presented to staff on the takeaways of Epic Games v. Apple to help staff understand "big tech" monopolization claims.

Federal Deposit Insurance Corporation | Washington, District of Columbia — May 2021 – August 2021
Pathways Intern in the Supervision, Legislation, and Enforcement Branch
- Counseled insured institutions on assessments of insured depository institutions, Federal securities laws, and consumer laws.
- Developed, drafted, and provided legal opinions on legislation, regulations, and policy statements relating to FDIC insurance.
- Drafted subpoenas in the support of the litigation of professional liability actions against directors and officers, attorneys, and accountants arising out of failed banks.

- Created resolution, receivership, and marketing plans for failed banks with hundreds of millions of dollars in deposits and loans.

United States Bankruptcy Court, District of Nevada | Reno, Nevada May 2020 – August 2020
Summer Extern for the Honorable Gregg W. Zive
- Researched complex business litigation issues arising out of bankruptcy to brief Judge Zive on the legal issues of cases.
- Analyzed briefs that parties submitted to the court to recommend and draft opinions for the court.
- Reviewed Chapter 11 restructuring plans that parties presented to the court for Judge Zive's approval.

State of Nevada Legislature | Carson City, Nevada January 2019 – June 2019
Attaché for Assemblyman Al Kramer
- Acted as primary support to Assemblyman Kramer for the 80th session of the Nevada Legislature.
- Responsible for scheduling meetings, compiling data, and representing the Assemblyman at events.
- Communicated with legislative counsel to draft legislation that the Assemblyman introduced in the Commerce Committee.
- Responded to correspondence from the Assemblyman's constituents regarding the Assemblyman's votes, proposed legislation, and statements made on legislation.

Sierra Nevada Media Group | Reno, Nevada July 2018 – January 2019
Account Executive – Sales
- Drafted business development plans that outlined expectations for revenues and implementation strategies for new products.
- Created and gave sales pitches that used market research, client data, and media strategies to close deals on products sold to new and existing clients to meet expected monthly and quarterly sales goals.
- Managed existing and potential client relationships in support of the company's larger business development and retention efforts.

Reese Kintz Guinasso Law | Reno, Nevada December 2016 – June 2018
Legal Intern and Lobbyist
- Conducted initial conversations with potential clients to create a basis of facts for the attorneys to make legal conclusions.
- Assisted with litigation through the creation of evidence packets, drafting of discovery responses, and reviewing documents ascertained through discovery.
- Drafted weekly email policy updates that provided a comprehensive analysis of proposed, amended, vetoed, and passed state legislation to send to clients that the firm represented at the Nevada Legislature.
- Planned and executed events at the state capitol to raise awareness for pro bono clients that the firm represented at the Nevada Legislature.

United States House of Representatives | Reno, Nevada May 2015 – August 2015
Legislative Intern (Unpaid)
- Took on legislative, administrative, and casework responsibilities, such as assisting in drafting comprehensive land conservation legislation and policy memos regarding judicial nominees.
- Supported the Washington D.C. team by informing them of constituents' needs across Nevada with information about rent, food, housing, and unemployment benefits.

PUBLICATIONS

- CFPB Releases Fall 2021 Supervisory Highlights (Weiner Brodsky Kider – Federal Regulatory Client Updates)
- Meme Stocks, Materiality, and More Enforcement (Working paper with a professor At George Mason)

INTERESTS

Exploring new restaurants, participating in triathlons, listening to podcasts, and watching collegiate sports.

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Academic Transcript

G01295612 Noah J. Teixeira
Mar 08, 2022 02:36 pm

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Transfer Credit Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Name : Noah J. Teixeira

Curriculum Information

Current Program
Juris Doctor

College: Antonin Scalia Law School
Major: Law

This is NOT an Official Transcript

DEGREE AWARDED

Graduation Intent Filed: Juris Doctor **Degree Date:**

Curriculum Information

College: Antonin Scalia Law School
Major: Law

TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

Fall 2019: University of Nevada Las Vegas

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
LAW	096	Intro to Lgl Res Writ &	T			

				3.000	0.00	
LAW	102	Contracts I	T	2.000	0.00	
LAW	110	Torts	T	4.000	0.00	
LAW	112	Civil Procedure	T	4.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	0.000	0.000	13.000	0.000	0.00	0.00

****Unofficial Transcript****

Spring 2020: University of Nevada Las Vegas

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
LAW	097	Trial-Level Writing	T	3.000	0.00	
LAW	103	Contracts II	T	2.000	0.00	
LAW	104	Property	T	4.000	0.00	
LAW	106	Criminal Law	T	3.000	0.00	
LAW	121	Const Law I-Structure of Gov't	T	3.000	0.00	
LAW	639	Disability Law Seminar	T	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	0.000	0.000	17.000	0.000	0.00	0.00

****Unofficial Transcript****

INSTITUTION CREDIT -Top-

Term: Fall 2020

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	098	LW	Appellate Writing	A-	2.000	7.34	
LAW	108	LW	Economics for Lawyers	B+	3.000	9.99	
LAW	167	LW	Bankruptcy	B+	3.000	9.99	

LAW	387	LW	Reg of Financial Institutions	A	3.000	12.00	
LAW	510	LW	Scholarly Writing	CR	2.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	11.000	39.32	3.57
Cumulative:	13.000	13.000	13.000	11.000	39.32	3.57

****Unofficial Transcript****

Term: Spring 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	099	LW	Legal Drafting (Legis. - Reg.)	B+	2.000	6.66	
LAW	116	LW	Administrative Law	B+	3.000	9.99	
LAW	172	LW	Business Associations	A	4.000	16.00	
LAW	266	LW	Legislation & Statutory Interp	B	2.000	6.00	
LAW	317	LW	Securities Law & Regulat	A	3.000	12.00	
LAW	407	LW	FinTech Seminar	A-	2.000	7.34	
LAW	511	LW	Law Journal Mgt - NSLJ	CR	1.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	17.000	17.000	17.000	16.000	57.99	3.62
Cumulative:	30.000	30.000	30.000	27.000	97.31	3.60

****Unofficial Transcript****

Term: Summer 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	223	LW	Role of the Prosecutor (W)	A	2.000	8.00	

LAW	337	LW	White Collar Crime	A-	3.000	11.01	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	5.000	5.000	5.000	5.000	19.01	3.80
Cumulative:	35.000	35.000	35.000	32.000	116.32	3.64

****Unofficial Transcript****

Term: Fall 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	245	LW	Intl Commercial Transact (W)	B+	2.000	6.66	
LAW	289	LW	Perspctves on Regulation	A	2.000	8.00	
LAW	321	LW	Supervised Externship (E)	CR	3.000	0.00	
LAW	322	LW	Sec Fin & Insol I	A-	3.000	11.01	
LAW	521	LW	Supervised Externship (Comp)	CR	3.000	0.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	7.000	25.67	3.67
Cumulative:	48.000	48.000	48.000	39.000	141.99	3.64

****Unofficial Transcript****

Term: Spring 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	082	LW	Leadership & Mgmt. for Lawyers	A	2.000	8.00	
LAW	201	LW	LglWriting for Lw Clerks(E)(W)	A	1.000	4.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

	Hours	Hours	Hours	Hours	Points	
Current Term:	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative:	51.000	51.000	51.000	42.000	153.99	3.67

****Unofficial Transcript****

TRANSCRIPT TOTALS (LAW) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	51.000	51.000	51.000	42.000	153.99	3.67
Total Transfer:	0.000	0.000	30.000	0.000	0.00	0.00
Overall:	51.000	51.000	81.000	42.000	153.99	3.67

****Unofficial Transcript****

COURSES IN PROGRESS -Top-

Term: Spring 2022

Subject	Course	Level	Title	Credit Hours
LAW	275	LW	Asset Management Law	2.000
LAW	298	LW	Professional Responsibil	2.000
LAW	321	LW	Supervised Externship (E)	3.000
LAW	646	LW	Hist & Foundation Admin State	2.000

****Unofficial Transcript****

RELEASE: 8.7.1

Jan M. Folena, Esquire
George Mason University
Antonin Scalia Law School
Adjunct Professor of Law
3301 Fairfax Drive
Arlington, VA 22201

September 20, 2021

Dear Your Honor:

It is my pleasure to recommend Noah Teixeira for a judicial clerkship. Noah was a student in my Securities Law and Regulation course at George Mason University, Antonin Scalia Law School during the spring semester of 2021. I am an adjunct professor at the law school, and also serve as Assistant Chief Litigation Counsel for the U.S. Securities and Exchange Commission.

Noah was an exceptional student and his legal acumen earned him one of the highest grades in the class. He attended every session, was always prepared, and enthusiastically participated in classroom discussions. Noah has an excellent attitude, is pleasant, and eager to learn. While the course employed a light Socratic method, Noah consistently volunteered to discuss the cases the class had been assigned to read and was particularly skilled at analyzing and briefing each of them. I was always able to depend on Noah to participate in even the most contentious discussions, ask the tough questions, and to provide keen insight about the law.

Noah's exam was excellent. His essays and short answers were well-written, discussed each element of each offense, and clearly answered the questions. Noah's exam exemplified his hard work and mastery of the relevant legal principles.

I am confident that Noah will make a spectacular law clerk and strongly recommend him for a judicial clerkship. His attention to detail and ability to digest and decipher even the most difficult material is commendable and will be an asset to any judge.

I appreciate the opportunity to write this recommendation for Noah and welcome any questions that you may have about Noah's abilities. Please do not hesitate to contact me at janfolena@ymail.

Very truly yours,

Jan M. Folena

Jan M. Folena, Esquire

Robert H. Ledig
Vartanian & Ledig, PLLC
5335 Wisconsin Avenue, NW, Suite 440
Washington, DC 20015
rledig@vllawfirm.com

September 12, 2021

Re: Recommendation for Noah J. Teixeira

Dear Judge:

I am a partner at Vartanian & Ledig, PLLC. I was previously Director of the Program on Financial Regulation & Technology and a Professor of Law at George Mason University's Scalia Law School. Prior to that, I was a partner at Dechert LLP and Fried Frank LLP in Washington, D.C. I am writing this letter to recommend that you hire Noah as a clerk in your chambers.

I first met Noah in the Fall of 2020, when he was a student in a class I taught called 'Regulation of Financial Institutions'. I learned that he was a transfer student from the University of Nevada, where he had grown up and attended college. I was impressed with his initiative and confidence to move across the country in the middle of the pandemic.

Noah worked to obtain very high grades in both classes that he took with me. He received one of two A's that I gave in my Financial Regulation class. He received an A- in my FinTech Seminar in the Spring of 2021, in which he wrote an excellent paper analyzing the legal issues associated with a fintech firm's use of a credit scoring algorithm that produces non-traditional credit scores. Noah also did an excellent job in presenting his paper to the class.

In and out of class Noah was engaged and eager to participate in discussions about financial services developments and regulatory policy. Noah showed excellent initiative when he quickly responded to a request I sent to my class for assistance in producing webinars with leading financial services regulators, which he understood would give him a special insight into this area. Over the next few months Noah helped me put on successful webinars with the Chairman of the FDIC, Jelena McWilliams, and the Acting Comptroller of the Currency, Brian Brooks.

Finally, in the short time that Noah has been in the D.C. area he has been able to secure highly competitive internship positions with prestigious financial services organizations. Noah's ability to balance a full work schedule during the day and full-time class schedule in the evening shows his dedication to succeed within the field of law. I hope that you can give Noah an opportunity to serve you.

Sincerely,

Robert H. Ledig

September 16, 2021

Molly Pfau, Esq.
United States Bankruptcy Court, District of Nevada
300 Booth Street, Fifth Floor
Reno, Nevada 89509

RE: Noah Teixeira

Dear Judge:

I am pleased to recommend Noah Teixeira for a position as a law clerk. Noah worked as an extern for United States Bankruptcy Court Judges Zive and Beesley in Reno, Nevada during the summer of 2020. As the Career Law Clerk, I was Noah's main source of contact at the Bankruptcy Court. Although we were remote at the time because of Covid-19, I was able to communicate with Noah regularly regarding various projects, settlement conferences, and cases heard by the Court. Noah was conscientious and always available by phone and email. I knew I could rely on him to complete any task assigned to him in a timely manner.

It was quickly apparent that Noah has very strong research and writing skills. He can locate and review relevant authority, and draft concise, readable, and usable memoranda. He is particularly good at applying the appropriate legal authority to the facts of a given matter and reaching a well-reasoned legal conclusion. I was impressed with how quickly he could grasp some of the complicated provisions of bankruptcy law and procedure.

Noah is also highly professional. His work ethic was excellent, and he was always friendly and engaging with the Judges and myself.

I highly recommend Noah for this position.

Sincerely,

Molly Pfau

Molly Pfau, Esq.
Career Law Clerk, United States Bankruptcy Court
775-326-2130

Noah Joseph Teixeira

(775) 671-7844 | nteixeir@gmu.edu | Washington, D.C. 20001

Writing Sample

The following writing sample is a bench memo that I wrote for a course titled "Legal Writing for Law Clerks." The professor clerked on the 7th Circuit and provided the class with sample formatting from his time as a clerk. The professor provided us with a real case for the bench memo. *Gutterman v. Indiana Univ., Bloomington*, No. 120CV02801JMSMJD, 2021 WL 3913493, at *1 (S.D. Ind. Sept. 1, 2021). After turning in this brief, every student presented their bench memo to the professor for a grade.

For the final assignment, the professor requires a judicial opinion based on our reasoning in the bench memo. I am still in the class and am still working on the judicial opinion. I would be happy to provide your chambers with the final opinion once I finish it.

BENCH MEMORANDUM

Date: **February 17, 2022**
To: **Judge Luther III**
From: **Noah Teixeira**

Re: ***Gutterman et al. v. Indiana University, Bloomington*, No. 21-2763**
Oral Argument: February 24, 2022
Panel: Judges Flaum and Easterbrook
District Court: S.D. Ind. Judge Jane Magnus-Stinson

The defendant (Indiana University, Bloomington "IU") accessed location data stored on the plaintiffs' ("the students") student IDs to verify their whereabouts for a hazing investigation. After finishing the investigation, the students brought an action against IU for accessing their student ID data without a warrant. This appeal challenges the district court's 12(b)(6) dismissal of the student's Fourth Amendment claim. The students argue that the district court erred because the warrantless search uncovered intimate details about their dorms, which they allege is an unreasonable search in violation of the Fourth Amendment.

I. BACKGROUND

In the fall semester of 2018, the students started school as freshmen and pledged a fraternity that IU investigated for hazing. At the time, the students lived in the on-campus dorms. IU interviewed the students during the investigation to inquire into whether the fraternity members hazed the students. The students stated in their interviews that they were in their dorm rooms on the night of the alleged hazing incident. IU verified the students' stories using the data recorded on their student IDs. Students at IU use their student ID to enter university facilities, pay for meals, access their dorms, rent library books, and pay for meals. The student ID records and stores data every time a student uses the ID. IU accessed that data to verify whether the students were in their dorm rooms on the night of the alleged hazing incident.

II. ISSUES AND ANALYSIS

(1) Did the district court commit reversible error by finding that the students failed to state a claim upon which relief can be granted because the search of the student ID data was reasonable?

Answer: No.

The parties agree that the district court's order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) receives *de novo* review. *Smith v. City of Chicago*, 3 F.4th 332, 335 (7th Cir. 2021).

IU argues that the search of the students' ID data was reasonable because the students' expectation of privacy in the ID data did not outweigh IU's interest in protecting students from hazing. The students argue that the search of the student ID data was unreasonable because it tracked the students' movements around campus and revealed intimate details about their dorm rooms. This court balances the search's intrusion on the individual's Fourth Amendment interests and the degree to which the search promotes the government interest to determine whether a search was reasonable. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 528 (7th Cir. 2018) (in civil cases, courts can assume a search occurred and determine the reasonableness of the search "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.") On balance, the students did not prove any facts that entitle them to relief because IU's legitimate interest in searching the records outweighs the degree to which IU intruded upon the students' Fourth Amendment interests. Fed. R. Civ. P. 12(b)(6); *Marshall-Mosby v. Corp. Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000) ("Dismissal under Rule 12(b)(6) is proper only where the plaintiff can prove no set of facts that would entitle him to relief").

(A) *Fourth Amendment interests*

This court looks to the individual's expectation of privacy to determine their Fourth Amendment interests. *See United States v. White*, 781 F.3d 858, 862 (7th Cir. 2015). The parties disagree over whether the students have an expectation of privacy in the ID data. IU argues that the students do not have an expectation of privacy because IU owns the ID data, IU's policies allow it to access the ID data, and the ID data revealed publicly available information. The students argue that the ID data reveals information about their dorm rooms, which they have an expectation of privacy in. Albeit small, the students have an expectation of privacy in the ID data.

IU argues that the ID data does not receive Fourth Amendment protection because it was available to the public eye. IU argues that the ID data uncovered information that neighbors, law enforcement, or others passing by could have seen. *U.S. v. Tuggle*, 4 F.4th 505, 514 (7th Cir. 2021) (this court did not find an expectation of privacy in information ascertained through a street camera because the public already had access). The dorms are not a public place with foot traffic. Individuals need a student ID to enter the dorm, which severely limits the public's ability to see whether students enter their dorm rooms. However, university officials like resident

assistants and other dorm residents could have seen the students enter their dorms. These individuals are not members of the general public, but they have access to the same data available to the public in *Tuggle*. Therefore, the students have a diminished expectation of privacy.

Moreover, IU alleges that the ID data does not receive Fourth Amendment protection because IU's policies allow it to access the ID data. Our holding in *Medlock* is instructive. *Medlock v. Trustees of Ind. Univ*., 738 F.3d 867, 872 (7th Cir. 2013). We found that the IU student had a diminished expectation of privacy because he consented to health and safety searches as a condition of living in the dorms. *Id*. Additionally, we recognized that the IU student traded *some* of his privacy because he chose[1] to live on campus. *Id*. IU alleges that the students do not have an expectation of privacy because IU's policies allow it to access the ID data for legitimate university purposes, like *Medlock*. However, we did not remove all of the student's privacy in *Medlock*, only some. *Id*. Thus, similar to *Medlock*, the students traded some of their privacy for the benefits associated with the card, but not all.

Finally, the students ask the court to treat their dorm rooms like an off-campus apartment and IU like a landlord, giving them a higher expectation of privacy. To reach this conclusion, the students allege that *Medlock* does not apply because this was not a routine room inspection, a university official conducted the search, and this was a formal investigation. While all of those facts are different, none of them weighed on this court's mind when it found that the student traded some of his privacy as a condition of living in the dorms. *Medlock*, 738 F.3d at 872. The students do not provide any federal case law that provides students with a heightened expectation of privacy. Therefore, the students have a diminished expectation of privacy because they live in the dorms.

(B) *Intrusiveness into Fourth Amendment interests*

The parties disagree over whether the search intruded into the intimate details of the students' dorm rooms. To start, the students stated in their initial pleadings that IU used the ID data to verify the students' alibis after an off-campus hazing incident, which did nothing more than reveal their location data for a single night. Beyond their location, the ID data for the single night did not disclose intimate details about their dorm rooms, as they allege.

Rather, according to the complaint, the ID data simply allowed IU to determine whether they entered their dorm room and nothing more. Not only are there holes in the idea that the ID data can uncover the intimate details of a dorm room, but it also wrongly assumes that the ID data accurately records whether someone was in the room to begin with. For example, a student could use their card to enter the dorm at night, grab a bag, and leave for the night, without the

[1] It is worth noting that the students here are first-years and the student in *Medlock* was a sophomore because first-year students are required to live on campus unless they meet one of these exceptions: (1) live with a parent or legal guardian within a 25-mile radius of IU; (2) transfer student entering your first semester of study at the Bloomington campus and have a minimum of 15 credit hours from another accredited university, college, or other IU campus that will be transferred and accepted by IU; (3) a part-time student who is enrolled in less than 12-credit hours each semester of your first year; (4) 21 years of age before the beginning of your first semester on the Bloomington campus; (5) married and/or have children; or (6) member of a recognized, self-governing, student organization (i.e. fraternity/sorority) and will reside in the organization's facility.

card recording when the student left. The student could come back the next morning and, based on the ID data, IU would have no idea whether they slept in their dorm or left earlier that morning to go off-campus. The ID data is non-intrusive because it does not provide an intimate view into the dorm room.

Even if the ID data allowed IU to intrude into the students' dorm rooms, case law supports the position that the search was non-intrusive because it did not uncover intimate details. The students compare the warrantless search of the ID data at issue here with cell phone location data, electronic trackers, and thermal image scanning of a home. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (government gained access to 127 days of cell phone location data without a warrant); *U.S. v. Jones*, 132 S. Ct. 945 (2012) (federal agents placed a GPS tracking device under the vehicle of an alleged cocaine dealer without a warrant); *United States v. Karo*, 468 U.S. 705, 708 (1984) (federal agents placed an electronic "beeper" in a can of chemicals commonly used for cocaine to track the location of the chemicals without a warrant); *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (federal agents used a thermal scanner to investigate whether the individual was growing marijuana in his home without a warrant). The warrantless searches that the students rely on provided the investigators with a detailed, prolonged view into intimate details of the suspects. Moreover, those searches uncovered many data points. Here, the ID data provided IU with just one data point for each student and did not intrude into the intimate details of the students' personal lives. Rather, it told IU whether the students entered their dorm one night.

(C) *IU's legitimate interest*

Even though the students have a diminished expectation of privacy and the IU did not intrude into intimate details, the court must weigh the government's interest. *Naperville*, 900 F.3d at 528 ("even a lessened privacy interest must be weighed against the government's interest in the data collection"). IU's stated justification for accessing the ID data was to protect its students from hazing. Of course, preventing hazing, a crime in Indiana[2], is a legitimate government interest. Students subjected to hazing may face schedule alteration, physical punishment, sleep deprivation, and possibly death. IU clearly has a cogent government interest in searching the students' ID data that outweighs the diminished expectation of privacy that the students have in the ID data. Therefore, the search of the students' ID data was reasonable.

III. **RECOMMENDATION: Affirm.**

[2] Ind. Code § 35-42-2-2.5(b) ("A person who knowingly or intentionally performs hazing commits a Class B misdemeanor).

Applicant Details

First Name	**Daniela**
Last Name	**Tenjido**
Citizenship Status	**U. S. Citizen**
Email Address	**dtenjidosierra@stu.edu**
Address	**Address** Street **1951 NW South River Dr Apt 1511, 1511** City **Miami** State/Territory **Florida** Zip **33125-2793**
Contact Phone Number	**3057633668**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2018**
JD/LLB From	**St. Thomas University School of Law** **http://www.stu.edu/law**
Date of JD/LLB	**May 14, 2021**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**St. Thomas Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**St. Thomas University School of Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Blanco, Francoise
FBlanco2@STU.EDU
305-962-0944
Plass, Stephen
splass@stu.edu

References

Honorable Carlton W. Reeves
United States District Court for the Southern District of Mississippi
carlton_reeves@mssd.uscourts.gov | (601) 608- 4140

Andrew Canter
Permanent Law Clerk to The Honorable Carlton W. Reeves
United States District Court for the Southern District of Mississippi
andrew_canter@mssd.uscourts.gov | (601) 608- 4140

Dr. Donald Tibbs
St. Thomas University School of Law
dtibbs@stu.edu | (215) 760- 2240

Professor Iris Rogatinsky
St. Thomas University School of Law
irogatinsky@stu.edu | (305) 474- 2402

Professor Stephen A. Plass
St. Thomas University School of Law
splass@stu.edu | (305) 623- 2314

Steven Greenbaum
Senior Vice President and General Counsel of TradeStation, Inc.
sgreenbaum@tradestation.com | (954) 228- 5505

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniela Tenjido
1951 NW South River Dr.
Miami, FL 33125
dtenjidosierra@stu.edu | (305) 763-3668

August 21, 2020.

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am a rising third year student at St. Thomas University School of Law and the Editor in Chief of the *St. Thomas Law Review*. I am writing to apply for the 2021–2023 term clerkship in your chambers.

I am a great fit in your chambers because I have a strong academic record but also the necessary social and situational awareness to be successful in a demanding job such as this one. I have excellent researching and writing skills as demonstrated by consistently achieving the highest grade in all legal writing courses in law school. As Editor in Chief of my law school's Law Review, I am also very familiar with the Bluebook as well as the editing process. Finally, this upcoming year, I will be one of only six students chosen to participate in my school's Appellate Litigation Clinic. There, I will be assigned two cases from the state appellate court and will be responsible for reviewing the trial record, preparing all briefs, and delivering the oral argument. This opportunity will train me for the practice of law before I have even graduated law school.

I am also uniquely qualified for this position because I spent this summer working in Judge Carlton W. Reeves' chambers in the U.S. District Court for the Southern District of Mississippi. There, I was given full autonomy and drafted four complete orders on motions and cross motions for summary judgment and one full order on a motion to dismiss. Some of the areas I had to research and write about included § 1983 and the Doctrine of Qualified Immunity, Compassionate Release under the CARES Act, Tort Law, and Insurance Law. I was also responsible for all of my own work, learned to answer a lot of my own questions by being inquisitive, and learned to handle multiple matters at once. I am able to accept criticism and incorporate feedback into my work very well too. I enjoy the process of becoming better by learning from more experienced individuals.

If chosen for this position, I strongly believe that my passion and commitment will radiate through the work that I do. I work extremely hard at everything that I do and have the utmost respect for this position. Although I am not a Virginia native, I am committed to relocating and have full flexibility. Thank you for considering my application.

Respectfully, Daniela Tenjido.

Daniela Tenjido

1951 NW South River Dr., APT 1511 • Miami, FL 33125 • (305) 763-3668 • dtenjidosierra@stu.edu

EDUCATION

St. Thomas University School of Law, Miami Gardens, FL
Juris Doctor Expected May 2021

GPA: 3.68 Class Rank: Top 5% (3/160)
Honors: St. Thomas Law Review*, Editor-in-Chief*, Moot Court, *Competing Member*, Dean's List (all semesters) · CALI Book Awards: *Criminal Procedure* (Summer 2020) · *Federal Income Taxation* (Fall 2019) · *Appellate Advocacy* (Summer 2019) · *Advanced Legal Research and Writing* (Spring 2019) · *Legal Research and Writing* (Fall 2018) · *Civil Procedure* (Fall 2018)
Activities: Academic Success Fellow · Research Assistant · Tax Law Society, *Member* · VITA, *Volunteer Tax Preparer*.

Florida State University, Tallahassee, FL
Bachelor of Science in Economics May 2018

Honors: Dean's List (Fall 2016) · Founder's and Patriots of America Achievement Award for Military and Academic Accomplishments (Fall 2015)
Activities: Army ROTC (Spring 2015 – Fall 2017)

EXPERIENCE

Appellate Litigation Clinic*,* Miami Gardens, FL
St. Thomas University School of Law Fall 2020 – Spring 2021

Being one of six students selected, I am responsible for at least two appeals in the state appellate court. My responsibilities include reviewing the record of the trial court, conducting legal research, drafting and filing the initial brief, the answer and reply briefs, and preparing and delivering the oral argument.

U.S. District Court for the Southern District of Mississippi, Jackson, MS
Judicial Intern to the Honorable Carlton W. Reeves Summer 2020

Drafted four full orders on various motions awaiting decisions in the criminal and civil docket. These orders were on motions for summary judgment, motions to dismiss, and a motion requesting compassionate release. Researched and wrote about various areas of law including § 1983 and the Doctrine of Qualified Immunity, Insurance Law, and Tort Law.

TradeStation Group, Inc., Plantation, FL
Legal Intern Summer 2018 & 2019

Assisted the company's general counsel with drafting and e-filing pleadings and motions through FINRA. Organized and prepared files for attorney review, and drafted letters to clients. Assisted in the preparation of discovery.

The Children's Campaign, Tallahassee, FL
Finance Intern Fall 2017 – Spring 2018

Used historical cost data, trend analysis, and inflation estimates to project costs for use in developing Voices for Florida and The Children's Campaign budgets. Assisted in the development of a process and detailed tracking spreadsheet to identify possible funders by County to support the Voices for Florida Statewide Outreach Network.

Florida Division Emergency Management, Tallahassee, FL
Legal Intern Spring 2016

Assisted in the development of a proposal for a Florida National Guard Emergency Activation Budget based on historical activation plans using Federal and State Emergency Declaration Guidelines.

SKILLS

Fluent in Spanish (reading, writing, and speaking) · Westlaw and LexisNexis Certified

Daniela Tenjido
St. Thomas University School of Law
Cumulative GPA: 3.6894

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Ira Nathenson	A	4	
Contracts	Stephen Plass	B	4	
Legal Research and Writing	Iris Rogatinsky	A	3	
Torts	Jay Silver	A	4	

Cali Book Award received in Civil Procedure and Legal Research and Writing.

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research and Writing	Iris Rogatinsky	A	3	
Constitutional Law	John Kang	B	4	
Criminal Law	Barbara Singer	C+	3	
Property	John Makdisi	B+	4	

Cali Book Award received in Advanced Legal Research and Writing.

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Susan Warheit	A	2	
Negotiations	Joseph Harbaugh	B+	1	

Cali Book Award received in Appellate Advocacy

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Lenora Ledwon	A	4	
Federal Income Taxation	Mark J. Wolff	A	4	
Interviewing, Counseling, and Negotiations	Keith Rizzardi	A	2	
Moot Court Class Component	Howard Blumberg	P	1	Mandatory course as part of being a member of the Moot Court competing team.
Trial Advocacy Practice	Houson Lafrance	A	3	

Cali Book Award received in Federal Income Taxation.

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Skills	Carol Castleberry	B+	4	
Business Associations	Todd Clark	B+	4	
Florida Wills and Trusts	Gordon Butler	B+	3	
Taxation of International Transactions	Francoise Blanco	A	4	

Summer 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure	Daryl Trawick	A	3	
Professional Responsability	Keith Rizzardi	A	3	

Cali Book Award received in Criminal Procedure

Grading System Description

The unit of credit at St. Thomas University School of Law is the semester hour. Credits may be earned in the regular fall and spring semesters or in a summer session. A student's performance in courses and seminars is evaluated with letter grades which translate into quality points according to the scales below:

GRADES AND GRADE POINTS

A = 4.0
B+ = 3.5
B = 3.0
C+ = 2.5
C = 2.0
C- = 1.5
D = 1.0
F = 0.0
P/NP = Pass/Fail (grade points are not applicable)

GRADING CURVE

Students are required to maintain a 2.0 grade point average to be considered in good standing. First year classes have a mandatory grading curve such that the average grade for each first year course must fall between a 2.25 and 2.5. Required upper level courses have a mandatory grading curve of 2.25-2.75. In each first year and upper division required course, at least 15% of all grades assigned shall be higher than C+ and at least 15% of the grades assigned shall be lower than C. Elective courses have a mandatory grading curve of 2.50-3.25. The current range of means requirement for electives (2.25-3.00) does not apply to Legal Writing, Summer–in-Spain, seminars, clinics, and skills courses. Elective courses with an enrollment of ten or less are exempt from the mandatory curves.

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is with great pleasure that I write this recommendation on behalf of my student Daniela Tenjido. During her law school attendance, Ms. Tenjido was a student in my International Taxation class and earned a grade of A in the class. She has obtained Dean's List in all semesters during law school. She has achieved CALI book Awards in Federal Income Taxation; Appellate Advocacy; Advanced Legal Research and Writing, and Civil Procedure.

I have found Ms. Tenjido to be diligent in her preparation for class, as well as insighftul and well organized in her thinking. She is a mature student who is positive and enthusiastic in her attitude towards the practice of law. She shows a fine capacity for legal thought, has exceptional writing and communication skills, and appears to be a person of high integrity.

Not only is Ms. Tenjido a remarkable student, but she is a well-rounded, having participated In the St. Thomas Law Review as Editor in Chief and competed with the St. Thomas Moot Court.

Ms. Tenjido is passionate about the study of law. I expect great things of Ms. Tenjido and it is without reservation that I give her my full and complete recommendation. Ms. Tenjido will be an asset to any program with which she chooses to associate.

Sincerely,

Francoise J. Blanco

Assistant Director, Student Affairs

Assistant Professors, Tax Clinic

Professor of Law

Francoise Blanco - FBlanco2@STU.EDU - 305-962-0944

ST.THOMAS UNIVERSITY
School of Law

16401 NW 37th Ave., Miami Gardens, FL 33054
(305) 623-2314 | splass@stu.edu

July 29, 2020

I write to recommend Daniela Tenjido for a law clerk position. Daniela was enrolled in my Contracts class in the Fall of 2018, and she has remained in regular contact with me since then. In Contracts, she proved to be a joy to teach because she was always well-prepared and particularly curious. It was apparent from day one that she loved everything about the law. Her regular participation, in and out of class, revealed her desire to understand the merger of contract theory and contract practice, and how it shapes the outcome of cases. Unlike many students who are satisfied just knowing the rules, Daniela is keenly interested in recent developments such as the law of rolling contacts and commercial arbitration, and their retooling of classical contract rules.

From my overall contacts with Daniela, I also know that she learns very quickly, and thinks thoroughly about the legal issues she is addressing. She listens well, seeks advice when necessary, and has been honing her research and writing skills since her first semester. These skills are being further refined by her work as editor of the law review. Because Daniela represents the best that one can expect from an aspiring lawyer, I recommend her without any reservation.

If you wish additional information or have any questions, I can be reached at (305) 623-2314.

Sincerely,

Stephen Plass
Professor of Law

Daniela Tenjido Sierra

dtenjidosierra@stu.edu / (305) 763-3668

St. Thomas University School of Law

Individual Objective Memorandum of Law Prepared for First Year Legal Research and Writing Class

QUESTION PRESENTED

Under Florida's attractive nuisance doctrine, is a landowner likely to be found liable for injuries sustained by a five year old child trespasser who fell from a rock climbing wall, located in the landowner's backyard when (a) the landowner's property is located in a neighborhood populated by young families with children, (b) the rock wall is normally concealed by a high wooden fence which a storm knocked down, creating an opening approximately one foot wide, (c) the landowner contracted professional help to fix the damage, posted warning signs and used caution tape in various locations throughout the property, (d) the trespassing child, after noticing caution tape securing the breach in the fence, worked for forty minutes to remove enough caution tape to enter the backyard, and (e) the trespassing child discovered the rock wall once he entered the landowner's backyard?

STATEMENT OF FACTS

Jason Cochran ("Mr. Cochran"), the owner of an investment firm with locations in New York and Florida, bought a two-acre property in Miami, Florida, in 2013. The property was located in an undeveloped neighborhood when Mr. Cochran bought it, and eventually became increasingly populated by young families with children. Mr. Cochran was attracted to the property in part because it was large enough to have an outdoor obstacle course. This was desirable to him since he enjoys extreme sports and wanted to work out regularly. He installed a 20 foot high rock wall in his backyard for this purpose. Due to his work, however, Mr. Cochran spent most of his time in New York, rarely visiting Florida. The property became his sanctuary. The property is surrounded by a high wooden fence that conceals the rock wall and helps keep children from being attracted to it. This was a relief to Mr. Cochran who knew children could be injured because they would not know to wear safety equipment.

A storm hit Florida last fall while Mr. Cochran was there. His property sustained damages such as a one foot wide breach in the fence, which left the property susceptible to trespassers. Before returning to New York, Mr. Cochran tried to get a contractor to fix the damage to his property, but due to all of the damage in the area, and the high demand, all contractors were back logged. After offering to pay double the going rate, he finally found a contractor who could do the work. The contractor began by unloading construction materials at the property, and indicated that repairs could begin in two weeks, which the contractor indicated was a quick work schedule under the circumstances. With the contractor's promise, Mr. Cochran felt comfortable heading back to New York for work.

Because the contractor would not begin working for another two weeks, Mr. Cochran took preventive measures to keep children out of the property. He posted ten large signs in the exterior of the property, three in the backyard, and three near the rock wall, all reading in large black letters, "Keep Out-No Trespassing." He ran caution tape around the base of the rock wall and around the piles of materials that the contractor had dropped off. Lastly, he asked his gardener to run the caution tape across the one foot wide breach in the fence to help prevent entry to the backyard.

The day after Mr. Cochran left for New York, two neighborhood children, Billy Miller ("Billy") and Leon, both age five, were playing in an alley behind Mr. Cochran's property when they saw caution tape fluttering on the fence and noticed the breach. Curious about the inside of the property, the boys worked for 40 minutes to remove enough caution tape from the fence to be able to enter Mr. Cochran's backyard. Once inside the backyard, the boys discovered the rock wall and ran to it, while challenging each other to climb it. Once they reached the rock wall, they tore off the caution tape around its base and climbed it. The handles of the rock wall were

slippery, but the children were still able to climb. However, after climbing about seven feet, Billy slipped and fell, sustaining injuries. You have asked me to research whether Mr. Cochran will likely be held responsible for Billy's injuries in the claim brought by his parents, Mr. and Mrs. Miller ("the Millers"), on his behalf.

DISCUSSION

The Millers will likely not be able to prove that Mr. Cochran is liable for Billy's injuries under Florida's attractive nuisance doctrine. The attractive nuisance doctrine is an exception to the general common law rule that trespassers have "'no right to demand that [a landowner] provide them with a safe place to trespass, or that he protect them in their wrongful use of his property.'" Martinello v. B & P USA, Inc., 566 So. 2d 761, 763 (Fla. 1990) (citation omitted). A landowner's only duty to a trespasser is to avoid "'willful and wanton harm to him and upon discovery of his presence to warn him of known dangers not open to ordinary observation.'" Id. (citation omitted). However, "[the doctrine] recognizes that trespassing children, unlike adults, may be incapable of perceiving or making reasonable judgements about dangers encountered on the [property]." Id. at 762. This exception "imposes a duty on a landowner . . . to trespassing children, that would otherwise not exist under circumstances of non-liability trespassers." Id. It "afford[s] the trespassing child . . . the same protection . . .that would be afforded to an invitee on the [property]." Id. If, however, "[a] jury believes the child does realize the risk of intermeddling with the dangerous condition, then the doctrine is [inapplicable]." Id. at 763.

To assert the attractive nuisance doctrine, a plaintiff must prove all of its elements. Tampa Elec. Co. v. Lariscy, 166 So. 2d 227, 229 (Fla. 2d DCA 1964). The doctrine requires that a landowner be liable for physical harm to a trespassing child caused by an artificial condition on the landowner's property when "'the place where the condition exists is one upon which the

[landowner] knows or has reason to know that children are likely to trespass.'" Martinello, 566 So. 2d at 763 (citation omitted). Additionally, the condition must be one "'which the [landowner] knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children.'" Id. (citation omitted). The plaintiff must prove that "'the children, because of their youth do not discover the condition or realize the risk involved in intermeddling with [the condition] or in coming within the area made dangerous by it.'" Id. (citation omitted). Moreover, the plaintiff must prove that the "'utility to the [landowner] of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved.'" Id. (citation omitted). Likewise, "'the [landowner] [must] fail to exercise reasonable care to eliminate or otherwise protect the children.'" Id. (citation omitted). Lastly, the landowner must "entice the children" onto the dangerous property. Id.

The Millers will likely meet their burden of proving that the rock wall exists in a place where Mr. Cochran knew or had reason to know that children were likely to trespass. Because of Billy's age, the Millers will likely meet their burden of proving that Billy did not realize the risk involved with intermeddling with the rock wall. The Millers will likely not meet their burden of proof for the rest of the elements required by the attractive nuisance doctrine.

A. Landowner's Knowledge of Children Trespassing onto Place Where Condition Exists

The first element a plaintiff must prove is that the landowner knew or should have known that children were likely to trespass onto the place where the condition exists. Id. "The test to be applied . . . is whether a reasonably prudent person should have anticipated the presence of children . . . at the place where the [landowner] created [the condition]." Carter v. Livesay Window Co., 73 So. 2d 411, 413 (Fla. 1954). Courts have also considered the nature of the place

where the condition exists, noting that residential neighborhoods, which are prone to be occupied by families with children, are places where a landowner should anticipate children will be present. Id.

The Millers will likely be able to prove that Mr. Cochran knew children were likely to trespass onto his property. Mr. Cochran had a high fence concealing his property, including the rock wall. This fence became of special importance to him when he realized his neighborhood had increasingly become populated by young families with children. He was aware that with an increased number of children, a fence would help eliminate the curious ones from his property. Mr. Cochran's awareness of the increasing number of children in his neighborhood will likely be sufficient to prove that he should have anticipated and known that children could trespass onto his property.

B. Landowner's Knowledge and Realization of the Condition's Unreasonable Risk

The second element a plaintiff must prove is that "'the condition is one which the [landowner] knows or should know and which he realizes or should realize, will involve an unreasonable risk of death or serious bodily harm to children.'" Martinello, 566 So. 2d at 763 (citation omitted). In order for a condition to involve an unreasonable risk, it must "present[] a hidden and unusual element of danger in such a way to constitute a trap." Sparks v. Casselberry Gardens, Inc., 227 So. 2d 686, 687 (Fla. 4th DCA 1969). Some examples are "[explosive] substance[s], [inflammable] material[s], a live wire, or a spring gun." Carter, 73 So. 2d at 413. In the case of the live wire for instance, the live wire would not show its danger by just looking at it, making its danger hidden and unusually dangerous. Id. Additionally, a condition is not inherently dangerous from the mere fact that it is attractive to children. Edwards v. Maule Indus., Inc., 147 So. 2d 5,7 (Fla. 3d DCA 1962); see also Banks v. Mason, 132 So. 2d 219, 222

(Fla. 2d DCA 1961) (swimming pool without a fence which attracted a child to enter and play on the property was held not to be an attractive nuisance because no hidden element of danger existed in it). In contrast, as illustrated in In re Estate of Starling v. Saha, a pond with a suctioning hose attached to a pump within the pond was deemed to pose an unreasonable risk. 451 So. 2d 516, 518-519 (Fla. 5th DCA 1984). There, the court held that the pond alone was not unreasonably dangerous, but the suctioning pump hidden in its depth was.

The Millers will likely not meet their burden of proving that Mr. Cochran knew or should have known and realized or should have realized that the rock wall posed an unreasonable risk to children. Mr. Cochran knew and realized that the rock wall could result in injuries to children. He took many safety measures to avoid trespassers for this very reason. However, the risk posed by the rock wall will likely not be deemed unreasonable. While Billy could have associated the rock wall with an amusement park or playground, and be attracted to it, the attractive nuisance doctrine requires that the condition's danger be hidden and unusual, not that the condition be merely attractive to the child. While the rock wall's height makes it dangerous, its danger is not hidden and unusual.

C. Capacity of the Child to Discover the Condition or Realize its Risk

The third element a plaintiff must prove is that the child, "'because of [his] youth, [did] not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it.'" Martinello, 566 So. 2d at 763 (citation omitted). Courts consider the child's age, experience, and intelligence in determining a child's realization and understanding of the risk. Larnel Builders, Inc. v. Martin, 110 So. 2d 649, 650 (Fla. 1959). While Florida has no fixed age after which a child cannot recover under the attractive nuisance doctrine, Lister v. Campbell, 371 So. 2d 133, 136 (Fla. 1st DCA 1979), it is most often applied to

young children; see Idzi, 186 So. 2d at 20; see also Nunnally 266 So. 2d at 76. For example, in Idzi v. Hobbs, the court concluded that a five year old child who was burned playing with remnants of fire, because of his age, did not realize the risk of playing with the though a parent had been previously instructed the child about the dangers of playing with fire. 186 So. 2d 20, 20 (Fla. 1966). Similarly, in Nunnally v. Miami Herald Publishing Company, the court noted in dicta that, although the defendant posted warning signs, because the plaintiff was eight years old, that factor had "virtually no consequence." 266 So. 2d 76, 78 (Fla. 3d DCA 1972).

The Millers will likely be able to prove that, because of Billy's age, he did not realize the risk involved in intermeddling with the rock wall. After discovering the rock wall, Billy ran to it and tore off the caution tape at its base. The caution tape and the warning signs posted around the rock wall, although meant to be a warning, did not work to discourage Billy from climbing the rock wall. Because of his age, both methods proved useless in making him realize the danger of intermeddling with the rock wall.

D. Utility and Burden of Eliminating the Condition as Compared to the Risk to Children

The fourth element a plaintiff must prove is that "'the utility to the [landowner] of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved.'" Martinello, 566 So. 2d at 763 (citation omitted). Determining the utility of the condition and the burden of eliminating it require a circumstantial analysis. Green Springs, Inc. v. Calvera, 239 So. 2d 264, 266 (Fla. 1970). Courts consider the public interest of allowing a landowner to use his land freely, but if "methods for preventing the danger exist without a burdensome cost . . . or without great interference with the free use of the land, a court will likely find the landowner's utility and burden slight as compared to the risk to children". Id. (citation omitted). In Ridgewood Groves, Inc. v. Dowell, the court concluded that the

defendant's benefit from maintaining large piles of debris, which killed a 7 year old child, were slight compared to its danger. 189 So. 2d 188, 191 (Fla. 2d DCA 1966). The defendant could have, without any inconvenience or burden, broken up the debris into smaller piles to avoid creating the dangerous condition. Id.

The Millers will likely not be able to prove that the risk the rock wall posed to children outweighs the utility Mr. Cochran receives from rock wall and the burden of eliminating its danger. Mr. Cochran bought the property because it was large enough to have an outdoor obstacle course, which was useful and important to him because he enjoys extreme sports. The burden of eliminating the danger posed by the rock wall is substantial because eliminating it all together would negate the very reason he bought the property and finding a contractor to fix the fence right away was impossible because of the lack of availability of contractors at the time. Additionally, the risk to the neighborhood children is low compared to the utility Mr.Cochran received from the rock wall. Mr. Cochran took extensive measures to keep trespassers away and minimize any possible risk posed to them by closing the fence's breach and posting warning signs. Moreover, the rock wall was effectively concealed by the high wooden fence. Even before the storm caused the breach in the fence, the rock wall had never been discovered by anyone and no one had ever trespassed on Mr. Cochran's land. The danger posed to the children in the neighborhood was low and remained low even after the storm caused the breach in the fence.

E. Landowner's Exercise of Reasonable Care to Eliminate the Condition's Danger

The fifth element the plaintiff must prove is that the landowner did not exercise reasonable care to eliminate the danger or to protect the children. Martinello, 566 So. 2d at 763. A landowner who "exercised all reasonable care that a reasonable man under the circumstances would have," even if that is merely providing warnings, is not liable even if his efforts are not

successful. Lister, 371 So. 2d at 135. In Nunnally, the defendant stationed a security guard in the area where it was reasonably expected persons could enter their property. 266 So. 2d at 78. Although the plaintiff was injured after entering through a different location, the defendant had met its duty of reasonable care under the circumstances. Id.

The Millers will likely not meet their burden of proving that Mr. Cochran failed to exercise reasonable care to eliminate the danger posed by the rock wall. Mr. Cochran posted 16 warning signs throughout the property and near the rock wall. He also took steps to prevent access to his backyard. The one foot breach in the fence became the possible point of entry into Mr. Cochran's backyard so he had the breach secured with caution tape. In case someone did access his backyard, he posted warning signs near the rock wall and wrapped its base in caution tape as well. He took steps to keep people out of his backyard and if someone did enter, he then took steps to warn them of the danger inside. Mr. Cochran did what a reasonable man under the circumstances would have done and therefore was at liberty to leave Florida after having done so. Although Billy may not have realized the risk from the warning signs or the caution tape, it will likely be found that it was not reasonably foreseeable to Mr. Cochran that any child would work for forty minutes to undo enough caution tape on the fence to squeeze into the backyard. Therefore, it is likely that Mr. Cochran met his duty of reasonable care in securing the breach in the fence and in attempting to eliminate the danger of the rock wall.

F. Landowner Entices the Children onto the Dangerous Property

The last element that a plaintiff must prove is that the landowner enticed the child upon the dangerous property. Martinello, 566 So. 2d at 763. For enticement of a child to occur, the child must be "lured or attracted" onto the property by the dangerous condition that hurt them. In re Estate of Starling, 451 So. 2d at 518. In Johnson v. Bathey, the court held that the nine year old

plaintiff was not lured onto the defendant's property by the irrigation pump that hurt him because the child did not discover the pump until he had "traveled some distance onto the property" and the reason he had entered the property in the first place was to collect free vegetables from the defendant. 376 So. 3d 848, 849 (Fla. 1979).

The Millers will likely not meet their burden of proving that Mr. Cochran enticed Billy onto the property. Billy approached the property after noticing the caution tape fluttering and seeing the breach in the fence. After working for 40 minutes to create an opening in the fence, Billy saw the rock wall once he was inside the backyard. Therefore, it did not lure him onto the property.

CONCLUSION

The Millers will likely only be able to prove two out of the six elements required by the attractive nuisance doctrine. Therefore, Mr. Cochran will likely not be held liable for Billy's injuries.

Applicant Details

First Name	**Willow**
Last Name	**Thomas**
Citizenship Status	**U. S. Citizen**
Email Address	**wt2@iu.edu**
Address	**Address** Street **1734 Portage Avenue** City **South bend** State/Territory **Indiana** Zip **46616** Country **United States**
Contact Phone Number	**5743238696**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2018**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 8, 2021**
Class Rank	**33%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Journal of Law and Social Equality**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ausbrook, Michael
micausb@iu.edu
812.322.3218

Downey, Robert
rdowney@indiana.edu

Hoffmann, Joseph L.
hoffma@indiana.edu
855-6150

References

Robert E. Downey: rdowney@indiana.edu
Phone (812) 855-8485

Joseph L. Hoffmann: hoffma@indiana.edu
Phone (812) 855-6150

Michael Ausbrook:
micausb@iu.edu
Phone (812) 322-3218

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Willow Thomas

• 544 S Lincoln St. Bloomington, IN 47401 • wt2@iu.edu • (574-323-8696)

September 1, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Judge Hanes,

I am a third year law student at Indiana University Maurer School of Law, writing to express my interest in clerking for your Chambers for the 2021 term.

Due to my exposure working on AEDPA cases in my law school's habeas corpus clinic, I hope to eventually work as a public defender or an appellate attorney for criminal law cases. I want to clerk because I know that a clerkship will provide unparalleled insight into oral and written advocacy, which are skills I will absolutely need if I am to become a strong advocate for future clients. I am especially interested in working for you given your background as an Assistant Federal Public Defender, and I sincerely believe that learning from a judge such as yourself will give me knowledge that I can use for the rest of my career.

I believe that my legal experiences during law school have helped prepare me for a clerkship for a number of reasons. First, I have significant experience working for a small team toward a common goal. My positions as a journal associate, law clerk, research assistant, and judicial and legal intern have all involved working in a small office under the direct supervision of a single person who directly oversaw my legal work. In addition, in those positions I conducted substantial targeted research and subsequent written analysis. My primary responsibility while interning for Administrative Law Judge Caroline Stephens Ryker of the Indiana Civil Rights Commission involved researching and drafting legal memoranda to assist the judge in deciding a variety of legal questions.

All of these experiences have contributed to my professional development and, if chosen, I look forward to drawing on these skills to effectively perform the work of a law clerk in your chambers. I am extremely enthusiastic about this opportunity, and I want to thank you very much for your consideration. If you require any additional information, please do not hesitate to contact me.

Best,

Willow Thomas

Willow Thomas

• 544 S Lincoln St. Bloomington, IN 47401 • wt2@iu.edu • (574-323-8696)

EDUCATION

Indiana University Maurer School of Law May 2021
Doctor of Jurisprudence Candidate (GPA: 3.519) Bloomington, IN

- Associate, Indiana Journal of Law and Social Equity
  - Note to be published: *Federal Rule of Evidence 609: A Catch-22 for Minority Defendants*
- Sherman Minton Moot Court Competition Quarterfinalist Fall, 2019
- Highest Grade in Seminar in Law and Psychology of Crime and Punishment Fall, 2019
- Executive Board Marshal & Member, Phi Alpha Delta

Indiana University Bloomington May 2018
Bachelor of Science in Public Affairs & Law and Public Policy Bloomington, IN
Minors: Gender Studies, Urban Development and Planning

LEGAL EXPERIENCE

Office of the Attorney General May 2020 - Present
Law Clerk for the Administrative Litigation Section Indianapolis, IN

- Aided deputy attorney generals by researching cases, preparing briefs, collecting data and interpreting legal information.
- Attended depositions, gathered information and filed complaints regarding cases.
- Enforced administrative regulations, and reviewed state and local laws to ensure compliance.

Indiana University School of Public and Environmental Affairs April 2020 - Present
Legal Research Assistant to Professor Lisa Amsler Bloomington, IN

- Researched state statutes, decisions, legal articles, codes and documents.
- Examined and generated memos on statutory law, case law and federal and state regulations using online research databases, such as Westlaw.

Student Legal Services May 2019 - Present
Legal Intern Bloomington, IN

- Investigated facts and laws to determine causes of action and to prepare cases.
- Conferred with clients and other involved parties to gather and track case information.
- Researched and drafted legal documents including pleadings, contracts, memos, and briefs.

Indiana Civil Rights Commission June 2019 – August 2019
Legal Intern for the Honorable Caroline Stephens Ryker Indianapolis, IN

- Researched laws, court decisions, and other documents relevant to cases to aide in Administrative Law Judge's decision-making.
- Assessed cases for probable outcomes by researching statutes, rules, case law, and other legal authority, and comparing fact patterns to those of precedential cases.
- Examined and generated memos on statutory law, case law, and federal and state regulations using online research databases and print sources.

Indiana University Undergraduate Mock Trial August 2018 - Present
Program Coach Bloomington, IN

Willow Thomas
Indiana University Maurer School of Law
Cumulative GPA: 3.517

Summer 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Hoffmann	B+	4	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Quintanilla	4	B+	
Contracts	Ochoa	4	B+	
Legal Research and Writing	Downey	2	A-	
The Legal Profession	Parrish	1	S	
Torts	Brown	4	A-	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Williams	4	B+	
Legal Research and Writing	Downey	2	A-	
Property	Cole	4	B+	
The Legal Profession	Dillard	3	A-	
White Collar Crime	Morrison	3	B+	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Orenstein	B+	3	
Federal Habeas Litigation	Ausbrook	A	2	
Law Journal	Fuentes-Rohwer	S	1	
Law and Psychology of Crime, Culpability and Punishment	Hoffmann	A*	3	Highest Grade in Class
Public Interest Internship	McFadden	S	2	
Reproduction, Childhood and Law	Madeira	A	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Fletcher	S	3	
External Moot Court Team	Lahn	S	1	
Federal Habeas Litigation	Ausbrook	S	2	
Law Journal	Fuentes-Rohwer	S	1	

Legislation	Widiss	S	3
Trial Advocacy	Diekhoff	S	3

The COVID-19 pandemic resulted in changes to instruction and academic policies, the law school went to a satisfactory/fail grading system during this semester.

Willow Thomas
Indiana University-Bloomington
Cumulative GPA: 3.596

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Finite Mathematics		C+	3	
First Year Spanish		B-	4	
Foundations of Outdoor Adventure		A	2	
Human Sexuality		A	3	
Introduction to International Studies		C	3	
Oceans and Our Global Environment		B	3	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Classical Mythology		A-	3	
Critical Approaches: Jesus, Alexander and Muslim Heroes		A-	3	
Introduction to Environmental Sciences		B	3	
Law and Public Affairs		A+	3	
Public Pral Communication		B+	3	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Career Development and Planning		A	2	
Elements of Governmental and Nonprofit Finance and Accounting		A	3	
Legal History and Public Policy		A-	3	
National and International Policy		B	3	
Themes in Gender Studies: Gender, Sex, and Purity		A	3	
Topics in Gender Studies: History and Politics of Feminism		A	3	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Constitutional Rights and Liberties		A-	3	
Financial Management		B-	3	
Professional Writing Skills		A	3	
Statistical Techniques		B+	3	

Summer 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to American Politics		A-	3	
The Computer in Business		A-	3	

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Issues in Gender Studies: Modern Love		A+	3	
Legal Process and Contemporary Issues in America		A+	3	
Stress Prevention and Management		A	3	
Urban Problems and Solutions		A+	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Gender Studies: Core Concepts and Key Debates		A	3	
Introduction to Emergency Management		A+	3	
Negotiation and Alternative Dispute Resolution		A	3	
Professional Experience		S	1	Satisfactory credit for internship
Urban Development and Planning		A-	3	

Summer 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Microeconomics		A-	3	
Overseas Topics in Public Affairs		A	6	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contemporary Issues in Public Affairs: Law and Immigration		A+	3	
Leadership and Ethics		A	3	
Problems in Gender Studies: Sex, Gender, and Politics		A	3	
Sex and Gender: Cross Cultural Perspectives		A	3	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contemporary Issues in Public Affairs: Contracts		A+	3	
Government Finance and Budgets		B-	3	
Introduction to Macroeconomics		B-	3	
Public Law and the Electoral Process		B+	3	

September 01, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Willow Thomas has asked me to write a letter of recommendation in support of her application for a clerkship with you. I am happy to do so because Willow has been just a one of my best and favorite students this past year in the federal habeas litigation clinic I direct. (We try to identify state non-capital cases that have a good chance of winning in federal court; we do a fair job of actually winning them.)

I am really lucky that Willow has re-upped for the coming fall semester because her work on a number of cases has been invaluable. Willow's attention to detail has saved a number of our filings from infelicities of mine. She works quickly, and her work has always been on time.

One project we worked on together this past semester involved a complicated problem related to a set of habeas claims and how to set them up in state court. It was a problem that would have challenged the most experienced federal habeas practitioner, and Willow came up with a solution that was both imaginative and correct. Which is to say that Willow would arrive at a clerkship with you with an understanding for federal habeas law that would be rare, I should think, among incoming federal judicial clerks fresh out of law school.

I have worked closely with Willow on at least three projects, and she has been nothing short of fun to work with. She is smart, precise, and has a sense of humor about her own mistakes—and mine. Willow is a great legal talent and a better human being. Having clerked for Justice Frank Sullivan, Jr., formerly of the Indiana Supreme Court, I am certain Willow would be an excellent clerk for you. She is certainly someone I would want in any chambers or office I was working in.

Please feel free to contact me, if you would like to know more from me about Willow.

Sincerely,

Michael K. Ausbrook
Adjunct Professor
Maurer School Federal Habeas Project

Michael Ausbrook - micausb@iu.edu - 812.322.3218

September 01, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to highly recommend Willow Thomas for a clerkship in your chambers.

Willow was a student in my year-long Legal Research and Writing class during the 2018-19 academic year. She has been a consistently top-notch writer, turning in an excellent memo for me first semester and an excellent brief second semester.

Her final assignment for me was a brief in support of a motion for summary judgment arguing for the enforceability of a pre-injury release form; it was one of the top briefs in the class. Because summary judgment is a common procedural posture, I find it important to get students working on such issues early. As a result, I'm confident that Willow is well prepared to research, analyze, and write about any legal problem set to her with accuracy, intelligence, and clarity.

Personally, it was a pleasure having Willow as a student; she is super smart. She always had a positive attitude and was engaged during my class. It would be a pleasure to work with her.

Willow has the qualities necessary to be a successful judicial clerk; she is hardworking, an excellent writer, and intellectually engaged. I assure you that she would be a welcome addition to your chambers.

Please do not hesitate to contact me if I can be of any further help on her application.

Sincerely,

Robert E. Downey
Senior Lecturer in Law
Indiana University Maurer School of Law

September 01, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter of recommendation on behalf of Ms. Willow Thomas, who is applying for a clerkship with you. I am delighted to give Ms. Thomas my highest recommendation for such an important position.

I have known Ms. Thomas since the Summer of 2018, when she first enrolled at the Indiana University Maurer School of Law in Bloomington. That summer, I taught the law school's intensive five-week "summer start" course – 1L Criminal Law – and Ms. Thomas was one of the fifty or so students who chose to enroll in that intensive "summer start" course. I also taught Ms. Thomas in a small seminar (with a very long name: Seminar in the Law and Psychology of Crime, Culpability, and Punishment) during the fall semester of her 2L year. I would say that I have gotten to know Ms. Thomas much better than I know most other law students.

Ms. Thomas is, in my experience, one of the very top students in her law school class. She did very well throughout the intensive "summer start" Crim Law course – so well that I viewed her as the "star" of the class, relying heavily upon her to provide the insightful answers that most other students couldn't give. She also did very well on the final exam; the only reason she got a B+ final grade is that our draconian 1L grading curve did not allow me to give more than two or three grades above that level.

In the 2L seminar, Ms. Thomas continued to shine, both in class discussions and in her research and writing. She wrote an outstanding final paper on Federal Rule of Evidence 609 and the "Catch-22" it poses for many minority defendants: If they have a prior criminal record, they face strong pressure not to take the stand. But by not taking the stand, they forego the opportunity to present themselves as unique individuals in front of the jurors – thus making it more likely that those jurors will default to stereotypical views about minorities. Ms. Thomas's final paper was so good that I designated her to receive the award for "highest A in the class."

Overall, Ms. Thomas had a GPA of 3.517 through three semesters. (Due to COVID-19, all law-school courses gave only "Satisfactory/Unsatisfactory" grades in Spring 2020.) That's a very high mark – IU Maurer does not provide class rankings, but Ms. Thomas surely would rank near the top of her class. She has never received a grade lower than B+ (which is our law school's strictly enforced median grade), and her performance has continued to improve over time – in her third semester (Fall 2019), she earned 3 A's, 1 B+, and 2 Satisfactory grades, for a semester GPA of 3.77.

Outside of her classes, Ms. Thomas has been active in seeking out the kinds of experiences that will prepare her well for a judicial clerkship. She's participated (and done well!) in both Mock Trial and Moot Court competitions, and she helped coach IU's award-winning undergraduate Mock Trial team. She has worked for IU Student Legal Services (gaining practical experience in various lawyering skills), and for the Indiana Civil Rights Commission (where she served as a Legal Intern). Ms. Thomas has participated in a unique and very intensive Habeas Corpus Clinic, during which she worked on actual federal habeas litigation. She is a currently an Associate with the Indiana Journal of Law and Social Equity. And in Summer 2020, she is serving as a Law Clerk for the Administrative Litigation Section of the Indiana Office of the Attorney General.

On the merits, I am completely confident that Ms. Thomas has the smarts, the thoughtfulness, the insight, the analytical ability, the legal knowledge, and the mature judgment to handle whatever might be thrown at her in a demanding judicial clerkship. On a personal note, Ms. Thomas is endearing and would be a pleasure to work with. She gets along well with her peers, and she takes advice and criticism well.

In conclusion, let me reiterate that I am more than happy to give my highest recommendation to Ms. Willow Thomas for a judicial clerkship with you. If you choose her, I know you will not be disappointed.

Sincerely,

Joseph L. Hoffmann
Harry Pratter Professor of Law
Indiana University Maurer School of Law

Joseph L. Hoffmann - hoffma@indiana.edu - 855-6150

Willow Thomas

• 544 S Lincoln St. Bloomington, IN 47401 • wt2@iu.edu • (574-323-8696)

Writing Sample

Attached please find a copy of my student note, Federal Rule of Evidence 609: An Evidentiary Catch-22 for Minority Defendants. I created this document as an associate for the Indiana Journal of Law and Social Equality at Indiana University Maurer School of Law. It will be published this January. Although benefitting from general comments from my peers and seminar professor, the writing sample represents my original work.

Federal Rule of Evidence 609: An Evidentiary Catch-22 for Minority Defendants

I. INTRODUCTION

The Federal Rules of Evidence govern the introduction of evidence in the United States federal courts for the ultimate purpose of ascertaining the truth and securing a just determination.[1] Arguably, one of the most controversial rules is Rule 609, which deals with the admissibility of criminal convictions for the purpose of impeachment.[2] Its origins stem from English common-law, in which criminals were deemed automatically incompetent to take the stand, being forever marked untrustworthy because of their prior history.[3] While defendants with criminal history are no longer automatically barred from taking the stand, Federal Rule of Evidence 609 allows for the introduction of evidence of a defendant's prior criminal history as a means of impeachment if the defendant takes the stand as a witness.[4] As a result, defendants often choose not to take the stand in order to prevent their criminal history from being introduced to the jury by the prosecution.[5]

This Note proposes that by discouraging defendants with a criminal history to take the stand and individualize themselves, Rule 609 disadvantages minority defendants by placing them in a position in which it is more likely jurors will rely on heuristic processes to make decisions regarding the defendant's guilt or innocence as well as the severity of the defendant's punishment. Furthermore, should a defendant choose to individualize themselves and take the stand in order to limit implicit stereotyping, this places the defendant at a greater risk for

[1] FED. R. EVID.102. *See also* Todd A. Berger*, Politics, Psychology, And The Law: Why Modern Psychology Dictates An Overhaul Of Federal Rule Of Evidence 609,* 13 U. PA. J.L. & SOC. CHANGE 203, 203 (2010).
[2] *Id.*
[3] Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 335 (1979).
[4] FED. R. EVID. 609.
[5] Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 837 (2016).

conviction because jurors are more prone to convict defendants when the defendant has a prior criminal record.

II. RULE 609 AND CRIMINAL DEFENDANTS

Rule 609 is comprised of two parts that dictate the means by which past convictions can be admitted into evidence to impeach criminal defendants.[6] The first part addresses convictions for crimes involving dishonesty or false statements.[7] Under Rule 609(a)(2), evidence of these convictions *must* be admitted.[8] The rule does not distinguish between felonies or misdemeanors.[9] The second, and arguably more concerning part, addresses the admissibility of convictions of crimes that do not involve dishonesty but were "punishable by death or by imprisonment for more than one year."[10] Evidence of these convictions must be admitted "if the probative value of the evidence outweighs its prejudicial effect to [the] defendant."[11] Unfortunately, the text of Rule 609 offers no guidance as to how courts should conduct this balancing test.

The two key cases underlying 609 are *Luck v. United States*[12] and *Gordon v. United States*.[13] These opinions emphasize the importance of considering whether 609 might "deter defendant testimony and thus might deprive the fact finder of valuable information."[14] In *Luck*, a pre FRE decision, the DC Circuit had to interpret a provision of the DC code that permitted the impeachment of a defendant on the basis of prior criminal convictions.[15] The court determined that whether a defendant could be impeached by a prior conviction should be determined by

[6] FED. R. EVID. 609.
[7] FED. R. EVID. 609(a)(2).
[8] *Id.*
[9] *Id.*
[10] FED. R. EVID. 609(a)(1)(B).
[11] *Id.*
[12] 348 F 2d 763 (DC Cir 1965).
[13] 383 F 2d 936 (DC Cir 1967).
[14] Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 856 (2016).
[15] Luck, 348 F2d at 768.

"sound judicial discretion," and that the chilling effect on defendant testimony should be considered.[16] In addition, the court emphasized that there will be "cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction." [17] The DC circuit explored this issue again two years later in *Gordan*, finding that a defendant with a prior conviction "may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility."[18] Ultimately, the court determined that there may be some instances in which it is more important to avoid the chilling of defendant testimony, despite the probative value of introducing such evidence:

> Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of punishment.[19]

As such, both *Luck* and *Gordan* emphasize that the chilling effect on defendant testimony can be enough to prohibit 609 motions.[20] Unfortunately, "numerous courts have inverted the meaning of this factor by treating the importance of the defendant's testimony as a reason to permit, rather than prohibit, the impeachment of that testimony." [21] District courts within the Second, Third, Fifth, and Tenth circuits have inverted the importance of the defendant's testimony to mean that evidence of prior criminal acts should be admitted, and the Sixth, Seventh, and Ninth Circuit courts have done the same. [22]

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[16] *Id.*
[17] *Id.*
[18] Gordon, 383 F2d at 939.
[19] *Id* at 940–41.
[20] Roberts, *supra* note 12 at 874
[21] *Id* at 846.
[22] *Id.*

While the balancing test within the text of 609(a)(2) was designed to prevent chilling defendant testimony, "admission of prior convictions for impeachment has become the default."[23] In a 2006 study of exonerated individuals, in every instance of the defendant testifying despite having a criminal record, the trial court permitted the prosecution to introduce evidence of the prior convictions for impeachment.[24] This was true even when the defendant's prior conviction was for an identical or similar offense. [25] Essentially, once the defendant chooses to take the stand as a witness, he or she opens the door for the prosecutor to introduce evidence of the defendant's prior felony convictions as well as convictions that involve dishonesty.[26]

III. ALWAYS A CRIMINAL, ALWAYS A LAIR: THE HISTORICAL AND PSYCHOLOGICAL BASIS FOR RULE 609

As is true for many other areas of the law, the Federal Rules of Evidence originates from English common law. [27] The basis for Rule 609 developed during the sixteenth and seventeenth centuries as a reaction to a change in criminal procedure that allowed criminal defendants to produce witnesses on their own behalf.[28] In fifteenth century England, only the prosecution could

[23] Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 856 (2016).
[24] John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record -- Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 483 (2008).
[25] *Id.*
[26] FED. R. EVID. 609(b): While the rule generally allows for prior convictions as a means for impeachment, time limitations, "evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." *See also* Todd A. Berger, *Politics, Psychology, And The Law: Why Modern Psychology Dictates An Overhaul Of Federal Rule Of Evidence 609*, 13 U. PA. J.L. & SOC. CHANGE 203, 204 (2010).
[27] Spector, *supra* note 4 at 335.
[28] Robert Popper, *History and Development of the Accused's Right to Testify*, WASH. U. L. Q. 454, 456 (1962).

produce witnesses.[29] It was during this time of reformation that rules were developed to determine who could testify and what types of witnesses were competent.[30]

Eventually it was established that convicted felons were not competent to testify in court because their testimony was considered inherently untrustworthy.[31] In addition, defendants were also deemed incompetent to testify on their own behalf due to the heightened risk of the testimony being perjurious.[32] While the assumed disqualification of criminal defendants was swept away with the procedural reforms of the nineteenth century, those disqualifications formed the "basis of judicial admissibility of prior convictions for impeachment purposes" that would eventually be codified by Rule 609.[33]

While multiple justifications have been advanced for admitting a defendant's prior convictions, a common rationalization is that a criminal conviction reveals a character trait of dishonesty that makes the defendant's testimony less reliable.[34] This assumption is not entirely outside what psychology tells us of human behavior.[35] In fact, many psychologists agree that there is continuity in a person's past behaviors and future actions.[36]

In 2000, Dolores Albarracin and Rober Wyer conducted a study to determine the extent that past behavior influences future actions.[37] In the study, "participants were led to believe that without being aware of it, they had expressed either support for or opposition to the institution of

[29] *Id.*
[30] *Id.*
[31] Spector, *supra* note 4 at 336.
[32] Robert Popper, *History and Development of the Accused's Right to Testify*, WASH. U. L. Q. 454, 456 (1962).
[33] Spector, *supra* note 4 at 336.
[34] Todd A. Berger*, Politics, Psychology, And The Law: Why Modern Psychology Dictates An Overhaul Of Federal Rule Of Evidence 609,* 13 U. PA. J.L. & SOC. CHANGE 203, 204 (2010).
[35] *Id. at 207.*
[36] *Id.*
[37] Dolores Albarracin & Rober Wyer, *The Cognitive Impact of Past Behavior: Influences on Beliefs, Attitudes, and Future Behavioral Decisions*, 79 J. PERS. SOC. PSYCH. 5, 5 (2000).

comprehensive exams."[38] Feedback about their past opinions, even though the opinions were manufactured, had a statistically significant impact on the participants' present attitudes and ultimate conclusions. These results suggest that past opinions or behaviors can influence a person's future decisions.[39]

That being said, the assumption that prior convictions automatically lead to inaccurate testimony fails to acknowledge "the role that different circumstances may play in determining how a person may act."[40] Social behaviors have a tendency to be largely variable in different situations.[41] For example, psychologist Walter Mischel's six-year study of children ages seven to thirteen found that most actions are determined by situational factors rather than general or consistent personality traits.[42] Psychologists Hugh Hartshorne Mark May came to a similar conclusion when observing children's tendency to lie, finding that:

> Most children will deceive in certain situations and not in others. Lying, cheating, and stealing as measured by the test situations used in these studies are only very loosely related. Even cheating in the classroom is rather highly specific, for a child may cheat on an arithmetic test and not on a spelling test, etc. Whether a child will practice deceit in any given situation depends in part on his intelligence, age, home background, and the like and in part on the nature of the situation itself and his particular relation to it.[43]

While the behavior of children may not translate perfectly into the behavior of adults, studies of adults have also found that past actions are likely to only influence future behavior when the circumstances surrounding both behaviors are largely the same.[44] In 1998, Judith Ouellette and Wendy Wood conducted a series of studies to determine how much a person's past behaviors

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[38] *Id.*
[39] *Id.*
[40] Todd A. Berger, *supra note 18* at 207.
[41] Walter Mischel, *A cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCH. REVIEW 2, 246-68 (1995)
[42] *Id.*
[43] Hugh Hartshorne & Mark May, *Studies in the Organization of Character*, READINGS IN CHILD DEVELOPMENT 190-97 (H. Hunsinger ed., 1971).
[44] Judith A. Ouellette & Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior,* 124 PSYCH. BULLETIN 54, 70 (1998).

dictate their future actions.[45] They found that "frequency of past behavior will now always be a good indicator of habit," especially when "contexts shift."[46] These studies raise serious doubts that an individual's prior history is indicative of how honest he or she will be in the future.[47] More often than not, situational factors will determine a person's decision to be honest, not his or her history of honesty or dishonesty.[48] As such, the psychological basis for 609 existing at all is limited at best.

IV. JURIES AND COGNITIVE REASONING

In order to understand how Rule 609 evidence effects juries' perceptions of minority defendants, it is first important to understand how juries reason. While reasoning can feel instantaneous, it is actually a process that happens over time as a result of the human brain relying on two distinct cognitive systems.[49] This "dual-process" account of human behavior best demonstrates the difficulties, both conscious and subconscious, juries face when tasked to make sound and rational judgments.[50]

The Dual Process theory proposes, "decisions [are] made with either a fast, unconscious, contextual process called System 1 or a slow, analytical, conscious, and conceptual process, called System 2."[51] These systems are sometimes also described as the implicit and the explicit or the subconscious and the conscious. System 1 is typically considered to be shared by all higher order organisms and as such has had a significantly longer evolutionary history.[52] It is commonly associated with visual perception because it is the system that allows for rapid,

[45] *Id.*
[46] *Id.*
[47] *Id.* at 69.
[48] Berger, *supra* note 18 at 318.
[49] Jennifer T. Kubota, *Stressing the person: Legal and everyday person attributions under stress*, 103 BIOLOGICAL PSYCH. 117, 118 (2014).
[50] *Id.*
[51] Geoff Norman, *Dual processing and diagnostic errors*, 14 ADVANCES IN HEALTH SCI. EDUC. 37, 37 (2009).
[52] Veronica Denes-Raj and Seymour Epstein, *Conflict between intuitive and rational processing: When people behave against their better judgment*, 66 J. PERSONALITY AND SOC. PSYCH. 819, 819 (1994).

contextual, and categorical interpretations, such as identifying a rhino or a sofa.[53] However, System 1 involves more than just visual perceptions. It encapsulates all sub-systems that involve associative learning processes.[54] Within System 1, heuristic analysis occurs. A heuristic is a "strategy that ignores part of the information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods."[55] While heuristic analysis can be highly efficient in some circumstances, in others it is prone to error and the utilization of implicit stereotyping and bias.[56]

System two, on the other hand, is often considered the rational system, which is slow, deliberative, verbally mediated, and primarily conscious.[57] It is commonly associated with the type of reasoning that leads to "effective problem solving." Where System 1 is automatic, comparing past experiences to present situations, System 2 operates on abstract rules.[58] Because System 2 is abstract, it can handle "hypothetical situations where no prior experience can inform judgments."[59] Essentially, System 2 acts as a "correctional step," to System 1 by fighting off the primary impulsivity of System 1 through analytic judgment and deliberative consideration.[60] While evidence exists to suggest that System 2 can act simply as a post hoc justification for the determinations of System 1, it is in System 2 that the brain is most likely to correct heuristic errors, including implicit racial stereotyping.[61]

[53] Norman, *supra* note 34 at 40.
[54] Denes-Raj & Epstein *supra* note 35 at 820.
[55] Gerd Gigerenzer & Wolfgang Gaissmaier, Heuristic Decision Making, 62 ANNUAL REVIEW OF PSYCH. 451, 455 (2011).
[56] Denes-Raj & Epstein *supra* note 35 at 820.
[57] *Id.* at 819.
[58] Norman, *supra* note 34 at 40.
[59] *Id.*
[60] *Id.* at 43.
[61] Kubota, *supra* note 32 at 118.

Due to the fact that correcting heuristic errors takes mental effort, the System 2 correctional step is more likely to fail when "cognitive resources are drained and busy."[62] Jury members typically experience this type of cognitive drain when they have to make decisions regarding the behavior of defendants. Because they are forced to make tough decisions, and are processing an immense amount of information, jury members often suffer from incomplete cognitive reasoning.[63] When suffering from cognitive drain, jury members are less likely to contemplate all the evidence and all the possibilities for why a crime occurred and are more likely to search for a "plausible scenario of what happened" and apply only the evidence that allows them to attach certainty to this story.[64] As a result of their manufactured certainty, juries relying on System 1 heuristics are more likely to choose extreme verdicts in the scenario that their "plausible scenario" assigns guilt to the defendant.[65] Without the availability of System 2, juries are at risk for making inaccurate judgments for all defendants, but are at even greater risk for making inaccurate judgments for minority defendants.[66]

V. ILLUSORY CORRELATIONS AND MINORITY DEFENDANTS IN THE COURTROOM

The effects of the defendant's race on legal judgments have been studied in many contexts, and both archival and experimental studies indicate that minority defendants "are more likely to be found guilty, and if convicted, [are given] longer sentences than White defendants."[67] Cognitive mechanisms operate in everyday perceptions and cognition that cause people to employ racial stereotypes for explaining behavior and subsequently come to a flawed

[62] *Id.* at 118.
[63] Deanna Kuhn, *How Well do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, 5 PSYCH. SCI. 289, 295 (1994).
[64] *Id.*
[65] *Id.*
[66] Christopher S. Jones, *The effects of racially stereotypical crimes on juror decision-making and information-processing strategies*, 25 BASIC & APPLIED PSYCH. 1, 2 (1995).
[67] *Id.*

determination about the culpability of the defendant.[68] This, in part, has to do with the fact that jury members rely heavily on heuristics to make determinations about culpability. Humans tend to "selectively notice and remember events that fit with preconceived conceptions and expectations."[69] This behavior is called "illusory correlation."[70] In essence, the more a person appears to fit with preconceived social notions of behavior, the more likely it is that jurors will determine that the person did that behavior.[71]

The unfortunate reality for minority defendants is that they exist in a society that expects that they will break the law.[72] Psychological evidence dating back to 1970 confirms that race is stereotypically associated with certain crimes. African American defendants have some of the worst associated crimes, being perceived as "more likely than their White counterparts to engage in soliciting, assault-mugging, grand-theft auto, and assault on a police officer."[73] These racial stereotypes, in combination with the "illusory correlation" behavior that plagues jury members' analysis of a defendant's behavior make it extremely difficult for juries to come to a just result for a minority defendant.

Even for jury members who do not consider themselves to be "racist" or "bigoted," stereotypic misconceptions invade the minds of jury members often in ways that the jury members themselves do not understand. This is because "illusory correlation" behaviors manifest in the subconscious. [74] Even when racial or ethnic stereotypes are subconsciously triggered,

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[68] Galen Bodenhausen, *The Role of Stereotypes in Decision-Making Processes*, 25 MEDICAL DECISION MAKING 1,2 (2005).
[69] *Id.*
[70] Jones, *supra* note 49.
[71] *Id.*
[72] Bodenhausen, *supra* note 51 at 114.
[73] *Id.* at 1.
[74] Jones, *supra* note 49.

those stereotypes systematically distort the way evidence is processed, placing an emphasis on information that makes defendant's fit with their stereotypic preconceptions.[75]

In a recent experiment, subjects were given information regarding a prisoner in order to determine whether that prisoner should be granted parole.[76] While the information about the prisoner's crime remained the same, during the experiment the prisoner's ethnicity was manipulated across various trials. In the presence of a racial or minority stereotype, subjects were less likely to consider the defendant's situational explanations for the crime, and more likely to rationalize that the defendant was the "type of person to commit this crime."[77] Similarly, in another experiment, a trial simulation revealed a strong correlation between defendant race and the assumptions of culpability as well as the administration of punishment.[78] In the trial simulations, minority defendants were more likely to be convicted, and if they were convicted, they were much more likely to be given a harsher punishment than their white counterparts who were also convicted.[79]

These studies establish that minority defendants are already at significant risk for racial stereotypes to influence and distort jury members' determinations regarding the defendant's culpability for the crime committed.[80] To make matters worse, because Rule 609 discourages defendants with a criminal history from taking the stand, minority defendants with a record are subject to even greater jury prejudice due to the effect pleading the Fifth Amendment has on jury perceptions of guilt and morality.[81] Despite the fact that jurors are scenically instructed that they "cannot draw negative inferences from a defendant's invocation of the Fifth Amendment," ample

[75] Bodenhausen, *supra* note 51 at 114.
[76] *Id.*
[77] *Id.* at 116.
[78] Jones, *supra* note 49 at 9.
[79] *Id.*
[80] *Id.*
[81] Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorney's Strategic Choices*, 40 FLA. ST. U. L. REV 1, 19 (2012).

evidence suggests that juries do just that.[82] In a study of mock jurors who read a trial transcript where the defendant invoked the Fifth Amendment, jurors tended to believe that the motivation for invoking the Fifth was to hide the defendant's guilt.[83] In another study, this time of a mock criminal trial, the more the defendant appeared to be withholding information the more the jury believed the defendant to be guilty.[84]

Minority defendants with a criminal history are at a distinct disadvantage. Because minorities live in a society that expects them to commit crime, "illusory correlations" cloud the reasoning of juries faced with a minority defendant charged with a race congruent crime.[85] The more the defendant fits with the perceived demographic of the type of person who would commit a crime, the more likely it is that jurors will determine that the defendant did that behavior, regardless of the quality of the evidence presented.[86] At the same time, minority defendants who choose not to take the stand to avoid introduction of Rule 609 evidence face even more negative inferences against them, because jurors assume that not testifying means that a defendant is guilty.[87] By avoiding Rule 609 evidence by not taking the stand, minority defendants essentially create another "illusory correlation" that proves to jurors, who primarily reason in System 1, that the defendant is guilty.

VI. HOW TO PUSH JURIES INTO SYSTEM 2 REASONING

While modern psychology makes it clear that someone who "is untruthful or willing to break the law in one context does not prove that he or she will be untruthful or break the law in another context," appropriate measures should be taken to ensure that "illusory correlations" do

[82] *Id.*
[83] Clyde Heinrick & David Shaffer, *Effect of pleading the fifth amendment on perceptions of guilt and morality*, 6 BULLETIN OF PSYCH. SOC. 449, 451 (1975).
[84] Sevier *supra* note 62at 19.
[85] Jones, *supra* note 49.
[86] *Id.*
[87] Sevier *supra* note 62 at 19.

not influence jury members decisions to assign culpability for minority defendants.[88] One such measure that has been used to combat bias is the process of individuation. Individuation is a method that "relies on preventing stereotypic inferences by obtaining specific information" about a person.[89] Studies suggest that by providing jury members with individualizing information about a defendant, such as a defendant's background, there is less of a chance that stereotypes will dominate the cognitive process of determining the defendant's culpability.[90]

Individuation effectively pulls the brain out of System 1 processing into System 2, replacing heuristic analysis with analytic judgment and deliberative consideration.[91] This makes it less likely that a juror's brain will rely on implicit biases to come to a judgment regarding the defendant's behavior. Furthermore, by individuating the defendant, jurors are more likely to attribute a defendant's behavior to the circumstances surrounding his or her actions rather than determine that the behavior was based on inherent traits.[92]

In a study predicting sex stereotypes, participants were asked to read a transcript of a telephone conversation in which an individual described his or her actions and experiences in three different life events.[93] Each individual was given a gender-stereotypic name. Surprisingly to the sociologists conducting the study, participants relied on the details of the individual's behavior in evaluating a person's traits rather than on gender stereotypes.[94] Similarly, another study found that after a group of study participants listened to an African American student share her experiences for twelve minutes, there was no evidence of stereotypic activation, even though

[88] Berger, *supra* note 12 at 214.
[89] Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 836 (2016).
[90] *Id.*
[91] Norman, *supra* note 34 at 43.
[92] Kubota, *supra* note 32 at 122.
[93] Anne Locksley, et al, *Sex Stereotypes and Social Judgment*, 39 J. PERSONALITY & SOC. PSYCH. 821, 822 (1980).
[94] *Id.* at 825.

the same study participants showed evidence of stereotypic activation within fifteen seconds of meeting the student.[95] Studies like these emphasize the importance of offering minority defendants the opportunity to individualize themselves. Revealing who they are as a person to the jury may be the most important thing a minority defendant can do to prevent implicit biases.[96]

However, in many cases, individualization requires that a defendant take the stand.[97] If the defendant takes the stand, rule 609 allows for prior criminal convictions to be entered as evidence.[98] The incentive to take the stand to individualize oneself is often outweighed by the risk that the jury learns about prior crimes will affirm implicit stereotypes.[99]

VII. FUNDAMENTAL ATTRIBUTION ERROR AND MINORITY DEFENDANTS ON THE STAND

As discussed above, individuation is an effective method for preventing racial biases and heuristic analysis from clouding the jury's mind when making a determination regarding the culpability of the defendant.[100] As such, it may seem surprising that any defendant would choose not to take the stand as a witness. However, the fear of introduction of 609 evidence against a minority defendant is typically enough to keep minority defendant's from testifying.[101]

Minority defendants place themselves at risk for introducing yet another "illusory correlation" if evidence of a prior conviction is revealed to the jury. [102] As described previously,

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[95] Ziva Kunda, et al, *The Dynamic Time Course of Stereotype Activation: Activation, Dissipation, and Resurrection*, 82 J PERSONALITY & SOC PSYCH. 283, 295 (2002).
[96] Roberts, *supra* note 12 at 874.
[97] Berger, *supra* note 12 at 216.
[98] FED. R. EVID 609.
[99] Roberts, *supra* note 70 at 874.
[100] *Id.*
[101] In a recent study of DNA exonerees, ninety-one percent of defendants with prior convictions waived their right to testify at trial, despite their innocence. Roberts, *supra* note 12 at 836.
[102] Jones, *supra* note 49.

humans selectively remember behaviors that affirm preconceived expectations.[103] If the assumption is that American society perceives minorities to be criminals, as evidence certainly suggests, then the fact that a minority defendant already has been convicted of a previous crime will certainly be used as an "illusionary correlation."[104] As such, evidence of a prior crime further affirms stereotypic biases that minority defendants are already at risk of being affected by and the evidence increases jury members' confidence in relying on those biases.[105]

In addition to creating "illusory correlations" against a defendant, evidence of a defendant's prior conviction, as allowed by Rule 609, also introduces the threat of Fundamental Attribution Error ("FAE").[106] This can be described as the tendency to "overvalue dispositional explanations and undervalue situational explanations."[107] FAE is what makes us think of people in terms of inherent traits rather than in terms of situational behaviors.[108] In his book *The Tipping Point*, Malcolm Gladwell provides the following example of FAE:

> If I asked you to describe the personality of your best friends, you could do so easily, and you wouldn't say things like "My friend Howard is incredibly generous, but only when I ask him for things, not when his family asks him for things," or "My friend Alice is wonderfully honest when it comes to her personal life, but at work she can be very slippery." You would say, instead, that your friend Howard is generous and your friend Alice is honest. All of us, when it comes to personality, naturally think in terms of absolutes: that a person is a certain way or is not a certain way.[109]

While attributing a person's behavior to inherent traits may be a common method of reasoning, such analysis fails to recognize the importance of recognizing the circumstances surrounding a person's behavior.[110]

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[103] See *supra* Part V.
[104] Bodenhausen, *supra* note 51 at 114.
[105] *Id.*
[106] Berger, *supra* note 12 at 207.
[107] Kubota, *supra* note 32 at 118.
[108] Berger, *supra* note 12 at 208.
[109] MALCOLM GLADWELL, THE TIPPING POINT, 162 (2000).
[110] Berger, *supra* note 12 at 208.

In the context of criminal defendants with a prior criminal history, FAE risks the assumption that a defendant committed a crime in the past because "they are the type of person who would commit a crime."[111] If exposed to evidence of a defendant's criminal past, cognitively stressed jury members would come to this exact conclusion.[112] A determination that a defendant has an inherent trait to commit crimes will likely influence a jury to believe that the defendant committed the crime in question, regardless of the validity of any other evidence presented.[113] Unfortunately, in the same way that an "illusory correlation" only increases a jurors confidence in determinations made with implicit stereotypes and heuristics, fundamental attribution errors increase a jury member's confidence that a defendant will act in the same way as they did in the past because their actions are a result of inherent characteristics.[114]

While individuation has been shown to effectively limit the effects racial biases and heuristics have on jury members' determinations of the culpability of criminal defendants, Rule 609 removes that opportunity for defendants who have committed crimes in the past. Introduction of evidence of a defendant's prior criminal history creates "illusory correlations" that further attack the innocence of the defendant and influence the jury to rely on heuristics and racial bias.[115] In addition, Fundamental Attribution Error may lead a jury to believe that the defendant, because he or she committed a crime in the past, has an inherent trait of criminality that cannot be changed. Such an attribution would invariably lead a jury to determine criminality despite the quality of other evidence presented. As such, Rule 609 significantly disadvantages minority defendants with a criminal history.

VIII. RULE 609 SHOULD EITHER BE ELIMINATED OR AMENDED

[111] Kubota, *supra* note 32 at 122.
[112] *Id.*
[113] *Id.*
[114] Bodenhausen, *supra* note 51 at 118.
[115] Kubota, *supra* note 32 at 122.

The purpose of Rule 609 is to ensure that juries are aware of the credibility of the defendant's testimony.[116] Modern psychology tells us that Rule 609 does not effectuate that purpose.[117] More often than not, situational factors will determine a person's decision to be honest, not his or her history of honesty or dishonesty.[118] Given that there is little to no psychological basis for Rule 609, and the prejudice against minority defendants is high, Rule 609 should be removed from the Federal Rules of Evidence, or amended to only include evidence of prior convictions of perjury.

Looking to how states use prior convictions, there is evidence to suggest that the effectiveness of Federal Rules of Evidence would remain even if Rule 609 were eliminated.[119] Montana, for example, prohibits introducing evidence that the witness has been convicted of a crime for the purposes of attacking the witness's credibility.[120] Hawaii only allows evidence of a defendant's prior crimes if the crimes involve dishonesty and the defendant themselves brought up their own credibility.[121] Virginia prohibits introduction of the name and nature of prior crimes, with the exception for perjury, when attacking a defendant's credibility.[122] These state rules suggest that eliminating 609 entirely would not have a devastating effect on federal criminal procedure, since many states function without it.

Should outright elimination of Rule 609 prove to be impossible, which is certainly a possibility considering the lack of reform of the rule despite countless efforts, 609 should be limited to the crime of perjury.[123] If the purpose of the rule is to ensure that jury members are aware of past dishonesty to determine the likelihood of dishonesty in the courtroom, the only

[116] FED. R. EVID. 609.
[117] Berger, *supra* note 18 at 207.
[118] Berger, *supra* note 18 at 218.
[119] Roberts, *supra* note 70 at 851.
[120] MONT. R. EVID. 609.
[121] HAW. R. EVID. 609.
[122] VA. R. EVID. 609.
[123] Berger, *supra* note 18 at 218.

crime relevant is past dishonesty in a courtroom.[124] As such, convictions of perjury should be the only convictions admissible for Rule 609.

IX. CONCLUSION

Rule 609 disadvantages minority defendants with criminal records by placing them in an impossible situation in which there is no way that they can make the correct decision. Rule 609 serves to inform juries as to whether someone is likely to lie on the stand by introducing past criminal acts, but modern psychological evidence suggests that Rule 609 does not effectuate that interest. In fact, Rule 609 ignores how changes in situational factors change the way people behave, and instead, presumes incorrectly that honesty or dishonesty are inherent human traits, when in reality, honesty and dishonesty are determined by contexts. By the introduction of Rule 609 evidence, minority defendants are subject to determinations by juries stuck in System 1 processing, which causes juries to be more likely to rely on subconscious processes to make decisions regarding the defendant's guilt or innocence. In fact, System 1 practically guarantees that implicit stereotypes are employed. Furthermore, should a defendant choose to individualize themselves and take the stand in order to limit implicit stereotyping and draw juries into System 2 processing, evidence suggests that this places defendant's with a criminal history at a greater risk for conviction because jurors are more prone to convict defendants when the defendant has a prior criminal record. This is because prior convictions act as both "illusory correlations" as well as fundamental attribution errors. As such, rule 609 is in need of significant amendment, or abolishment in general.

[124] *Id.*

Applicant Details

First Name	**Tessa**
Middle Initial	**R**
Last Name	**Tigar-Cross**
Citizenship Status	**U. S. Citizen**
Email Address	**trtigarcross@email.wm.edu**
Address	**Address** Street **1616 N Central Avenue** City **Phoenix** State/Territory **Arizona** Zip **85004** Country **United States**
Contact Phone Number	**5128390949**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2016**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 21, 2021**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Business Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Pro Se**

Recommenders

Stone, Caleb
crstone@wm.edu
757-221-7443
Larsen, Allison Orr
amlarsen@wm.edu
(757) 221-7985

This applicant has certified that all data entered in this profile and any application documents are true and correct.

119 Mimosa Drive
Williamsburg, Virginia 23185
(512) 839-0949
trtigarcross@email.wm.edu

August 23, 2020

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

I am a third-year student at William & Mary Law School seeking a judicial clerkship in your chambers for the 2021-2023 term. I have particular interest in clerking for the U.S. District Court for the Eastern District of Virginia because I intend to relocate to Richmond to practice. I am interested in clerking for you specifically because of our shared commitment to community service. Prior to entering law school, I was awarded an AmeriCorps VISTA fellowship to serve as a Program Assistant at The Annette Strauss Institute. I collaborated with Austin-area schools to bring civics education opportunities to underserved youth. Given my diverse professional experience, and my strong legal research and writing skills, I am confident I would be a valuable addition to your team.

This summer, I am serving as a judicial intern for Administrative Judge Kathryn Brown at the Equal Employment Opportunity Commission's Hearings Unit. Under Judge Brown's supervision, I draft bench memoranda, summary judgment decisions, and case management orders. I also attend settlement conferences, and independently brief settlement mediators on case history. My experience managing a robust caseload with meticulous attention to detail will enable me to provide effective support to you as your clerk.

Further, I was selected through a competitive writing competition to join the *William & Mary Business Law Review*. As a second-year staffer, I completed rigorous cite-checking duties while writing a unique piece of scholarship. In addition to these duties, I applied for and was selected to serve on the journal's Editorial Board as an Associate Editor—a rarity for a second-year student. I dedicated ten hours a week to independently editing articles for publication, conducting a source review for all articles, and transcribing article edits after each round of staffer editing.

I have attached my résumé, writing sample, and unofficial law school transcript for your review. My two letters of recommendation will be sent under separate cover. I would welcome the opportunity to interview with you and to discuss my qualifications for a clerkship in your chambers. Thank you for your time and consideration.

Respectfully,

Tessa Tigar-Cross

TESSA TIGAR-CROSS

trtigarcross@email.wm.edu • 512.839.0949 • 119 Mimosa Dr., Williamsburg, Virginia, 23185

EDUCATION

William & Mary Law School, Williamsburg, Virginia — J.D. expected May 2021
G.P.A.: 3.3, Class Rank: Top 44%
Honors: *William & Mary Business Law Review*, **Associate Editor**
Activities: *Family & Education Law Society*, **Treasurer**
Jewish Law Students Association, **Co-President**

University of Texas at Austin, Austin, Texas
B.A., *high honors*, Double Major in Government and Psychology — May 2016
G.P.A.: 3.91

EXPERIENCE

Judicial Extern, The Honorable Lyle E. Frank — New York, New York
New York State Supreme Court, New York County — August 2020 to November 2020
Conduct legal research on motions before the court, abiding by legal research procedures. Attend oral argument on motions, settlement conferences, and discovery conferences.

Judicial Intern, Administrative Judge Kathryn Brown — Washington, D.C.
Equal Employment Opportunity Commission, Hearings Unit — May 2020 to August 2020
Attended hearings and conferences. Drafted bench memoranda, summary judgment decisions, and case management orders. Independently briefed settlement mediators on cases scheduled for settlement conferences. Assisted pro se complainants with filing deadlines, virtual hearing preparation, and provided neutral legal guidance.

Legal Clinic Intern — Williamsburg, Virginia
Lewis B. Puller, Jr. Veterans Benefits Clinic — August 2019 to December 2019
Conducted client intake interviews. Drafted notices of disagreement and supplemental claim briefs, and filed appellate motions. Independently compiled evidence for disability compensation claims. Wrote monthly client case updates.

Legal Fellow — Geneva, Switzerland
International Bridges to Justice — May 2019 to August 2019
Created form contracts which complied with the Swiss Code of Obligations for use at IBJ's Geneva headquarters. Researched and drafted a Code of Conduct and Ethics and a new Harassment Policy. Updated Equal Employment and Diversity, Procurement, and Travel Reimbursement policies and procedures. Updated language used in independent contractor and employment contracts used in IBJ's Cambodia offices. Created new training manual for all country office directors.

Social Media Outreach Intern — Austin, Texas
The B Hive — August 2017 to May 2018
Managed social media activities for a women's networking group. Created all media visuals, drafted feature stories on members, and curated advertisements resulting in an increase of more than 600 followers and the onboarding of more than 40 new members.

Program Development Assistant — Austin, Texas
Annette Strauss Institute for Civic Life (through Americorps VISTA) — June 2016 to June 2017
Guided teams of middle and high school students to address community issues through an arts-integrated civics education curriculum. Wrote classroom teaching exercise on conducting research. Edited grant proposals that increased yearly private funding from $25,000 to $75,000. Recruited 120+ community members and government officials to volunteer for the Youth Civics Fair. Created database for fundraising and grant proposals. Managed 10 undergraduate students as in-classroom mentors.

Legislative Research Intern — Austin, Texas
Project Vote Smart — August 2014 to May 2015
Summarized articles of state and federal legislation across topics, synthesizing proposed changes to law and main platform of bill supporters. Updated state and federal voter information databases.

SERVICE

Administrative Volunteer, *Dress for Success Austin*, Austin, Texas — July 2017 to July 2018
Teaching Aid Volunteer, *Stop Abuse for Everyone (SAFE) Alliance*, Austin, Texas — November 2017 to June 2018
Volunteer, *Inside Books Project*, Austin, Texas — September 2015 to July 2018

Interests include reading comedy and mystery novels, hiking, baking, and listening to golden oldies.

Tessa Tigar-Cross
William & Mary Law School
Cumulative GPA: 3.30

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Aaron-Andrew Bruhl	B+	4	
Criminal Law	Nancy Combs	B+	4	
Lawyering Skills I	Pamela Hutchens	P	1	
Legal Research & Writing I	Jennifer Franklin	B+	2	
Torts	James Stern	B+	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Allison Orr Larsen	B+	4	
Contracts	Nathan Oman	B+	4	
Lawyering Skills II	Pamela Hutchens	P	2	
Legal Research & Writing II	Jennifer Franklin	B+	2	
Property	Lynda Butler	B	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Employment Discrimination	Laura Windsor	B+	3	
Evidence	Mason Lowe	B+	3	
Family Law	Vivian Hamilton	B+	3	
Puller Veterans Clinic - Disability Compensation & Appeals	Caleb Stone	A-	3	
W&M Business Law Review		P	1	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Allison Orr Larsen	P	3	
Advanced Writing & Practice: Criminal	Nathan Green	P	2	
Employment Law	Christopher Abel	P	3	
Professional Responsibility	Mason Lowe	P	2	
Trial Advocacy	Gary Hicks, Holly Smith, Douglas Walter, & Timothy Clancy	P	3	
W&M Business Law Review		P	1	

Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to

choose ordinary letter grades.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Art & Cultural Heritage Law	Jennifer A. Morris	IP	2	
Criminal Procedure II (Adjudication)	Adam Gershowitz	IP	3	
Food and Drug Law	Stacy Kern-Scheerer	IP	3	
Judicial Externship	Robert Kaplan	IP	3	
Supreme Court Seminar	Neal Devins	IP	2	
Testing the Rule of Law	Michael McAuliffe	IP	1	

Courses listed for the Fall 2020 semester will commence August 17, 2020, and are listed as In Progress (IP).

Grading System Description

Grading Policy:

The grading policy for William & Mary judicial clerkship applicants graduating in 2015 or later is at

http://law.wm.edu/academics/whatabout/examsgradestranscripts/gradingpolicy/gradecurve/index.php.

Class Rank Policy:

William & Mary J.D. transcripts report grade point averages to the nearest hundredth. However, there is little statistically significant difference among cumulative GPAs that extend beyond one decimal point. For class rank purposes, therefore, GPAs are rounded to the nearest tenth. (For example, GPAs falling between 3.35 and 3.4 are rounded to 3.4.) It is therefore important for employers to use official Law School GPAs rounded to the nearest tenth, not the GPA carried to hundredths on transcripts, when evaluating grades.

Students holding a GPA of 3.6 or higher are given a numerical rank. All ranks of 3.5 and below are given a percentage. The majority of the class will receive a percentage rather than numerical class rank. In either case, it is likely that multiple students will share the same rank.

Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms (i.e., no re-ranking will occur following a summer term).

Caleb R. Stone, Esq.
Professor of the Practice
The Lewis B. Puller, Jr. Veterans Benefits Clinic
William & Mary Law School
P.O. Box 8795
Williamsburg, Virginia 23187-8795

Phone: 757-221-7443
Fax: 757-221-3131 (Fax)
Email: crstone@wm.edu

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing in support of Tessa Tigar-Cross's application to serve as your law clerk. Tessa worked for the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School for the Fall 2019 Semester. I was her supervising professor. The Puller Clinic fights for veterans who have disabilities related to military service. Our students have a lot of autonomy to make decisions on our cases, and they are the primary point of contact with our clients.

Throughout her time in the Puller Clinic, Tessa proved herself to be highly adaptable. Though VA disability compensation law is extremely technical and complex, she was able to enthusiastically absorb a large amount of new information quickly and thereby effectively represent our clients.

She also demonstrated the ability to think and act independently. Tessa was good at spotting potential problems and solving them long before they arose. She would consistently take the initiative to make plans far in advance, break large tasks into smaller steps, and set internal deadlines. But she also showed exceptional comfort with the ever-changing facts and circumstances that come with law practice, and she was willing to adapt as necessary to accomplish our goals.

Finally, Tessa is also a highly effective communicator. She was excellent at conveying complex information in a way that people could easily understand. All of her clients were dealing with psychological trauma, and she was able to connect with them empathetically and gracefully. Both her mental acumen and social skills were essential to her success in moving her cases forward. A lesser student would likely not have made any progress on the particular cases that I assigned to her.

I think that Tessa's talent will help her shine in a clerkship setting, and I do not doubt that she would serve effectively as your law clerk. If you have questions, please contact me by email at crstone@wm.edu or by phone at 757-221-1096.

Sincerely,

/s/

Caleb R. Stone, Esq.
Professor of the Practice & Co-Director of
The Lewis B. Puller, Jr. Veterans Benefits Clinic
William & Mary Law School

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Allison Orr Larsen
Professor of Law and Director, Institute of the Bill of Rights Law

Phone: 757-221-7985
Fax: 757-221-3261
Email: amlarsen@wm.edu

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Tessa Tigar-Cross

Dear Judge Hanes:

I am a law professor at William and Mary law school and a 2L student of mine, Tessa Tigar-Cross, has applied to be your law clerk. I certainly recommend Tessa for the job.

I taught Tessa in my constitutional law class last year, a class with approximately 50 students in it, and I taught her again in Administrative Law, a class of approximately the same size. Tessa is always prepared for class, and I can tell that she listens intently to every word I utter. She asks good questions and her contributions to class discussions are always on point and relevant. Tessa did well on my con law exam (she earned a B plus) and she wrote an admirable exam in administrative law which due to the COVID-19 pandemic was only graded pass / fail (and Tessa passed). I was particularly impressed with Tessa's ability in both exams to convey arguments concisely: she articulated analogies to precedent and tapped into normative sentiments in a sophisticated manner all while not losing focus and sticking to the point.

Tessa is a frequent visitor to office hours and it is there that I have gotten to know her best. In both semesters I taught her Tessa often asks probing questions after class – questions that display a deep understanding of the topic and the relevant tensions. She actually came to me before enrolling in administrative law because she was interested in an employment issue from the EEOC and she wanted to learn more. It became apparent to me in that conversation that Tessa was trying to teach herself administrative law before day one of taking the course. She has a terrific intellectual tenacity that I admire. I can see that she is attracted to legal puzzles and she does not want to move on until she fully understands the piece she is working on. That persistence will make her a great law clerk and a fabulous attorney.

Tessa is bright, hard-working, and conscientious. I have no doubt she would make a terrific law clerk. Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/

Allison Orr Larsen
Professor of Law
William & Mary Law School
(757) 221-7985

Tessa Tigar-Cross
119 Mimosa Drive | Williamsburg, Virginia 23185
512.839.0949 | trtigarcross@email.wm.edu

WRITING SAMPLE

I prepared this Brief in Support of a Motion to Admit Out of Court Statements on behalf of the Commonwealth of Virginia during the Spring 2020 semester for my Advanced Criminal Writing & Research class.

I certify this brief is solely my own work.

ISSUE SUMMARY

The Defendant, Claire Underwood, has been indicted as a co-conspirator for the murder of Zoe Barnes. The three co-defendants—Frank Underwood, Edward Meechum, and Doug Stamper—have all expressed that they are unwilling to testify for the Commonwealth, and if called will exercise their Fifth Amendment right. The Commonwealth seeks to admit the statements made on September 15, 2019, by co-defendant Doug Stamper to his girlfriend, Rachel Posner.

On July 27, 2019, a neighbor discovered Zoe Barnes' body inside the bedroom of her James City County residence. This neighbor informed investigators that Barnes had been intimately involved with Frank Underwood. Investigators interviewed Frank Underwood and his wife, Claire Underwood, who both denied involvement. After receiving a tip, law enforcement obtained a search warrant for the Underwood's Google Messenger account. The information contained in these messages led to the arrest of Frank Underwood and Claire Underwood on July 29, 2019.

Initially, investigators interviewed Frank Underwood's assistant, Doug Stamper, because he could indicate Frank Underwood's whereabouts on July 26, 2019. Stamper claimed he was at home alone on the night of July 26, 2019, and claimed Frank Underwood had been out of town. After the evidence provided by the Underwood's Google Messenger, investigators, on August 2, 2019, interviewed Stamper and he again denied involvement in the murder.

On September 17, 2019, investigators interviewed Stamper's girlfriend, Rachel Posner. Posner had previously acted as a confidential informant for neighboring Gloucester County Narcotics. James City County investigators were aware of Posner's previous reliable assistance, but interviewed her now in connection to Barnes' murder. Posner stated that Stamper had shown up at her residence on September 15, 2019, and repeatedly denied any involvement in the murder. Stamper then left Posner's residence only to return shortly thereafter. Posner explained that when Stamper returned to her home he described the events of July 26, 2019, to her. Posner reported a summary of the statements made by Stamper. The Commonwealth seeks to admit these statements.

ARGUMENT

The Court should admit the hearsay statements made by defendant's co-conspirator, Doug Stamper, while venting to his girlfriend, Rachel Posner. Under *Crawford v. Washington*, cross examination is only necessary to satisfy the Sixth Amendment's Confrontation Clause when the statement is testimonial in nature. 541 U.S. 36, 59 (2004). If a statement is non-testimonial in nature then the Confrontation Clause is not implicated. *Id.* The statements offered by the Commonwealth were made by an individual venting to their non-marital significant other. Thus, the Court should find that these statements do not violate the Confrontation Clause because an objective observer would not believe these statements were testimonial. *Id.*

Non-testimonial hearsay statements which do not implicate the Confrontation Clause must still satisfy a hearsay exception to be admitted. *See* Lilly v. Commonwealth, 499 S.E.2d 522, 533 (Va. 1998) (*Lilly I*). The Court should find that these hearsay statements may be admitted under the long-accepted statement against interest hearsay exception. VA. CODE ANN. § 8.01-397 (West 2020); *see also Lilly I*, 499 S.E.2d at 533. The statement against interest hearsay exception is satisfied when a statement is an admission of some wrongdoing, which the declarant is aware of, and there is some evidence which tends to show the reliability of the statement. VA. CODE ANN. § 8.01-397 (West 2020). The statements from Stamper to his girlfriend, Posner, satisfy the statement against interest hearsay exception. Thus, the Court should admit the out of court statements because each statement qualifies as a statement against interest.

I. Because the Statements are Non-testimonial in Nature, the Statements Do Not Implicate the Confrontation Clause.

The statements made by Doug Stamper to his girlfriend, Rachel Posner, were non-testimonial. The admission of non-testimonial hearsay does not offend the Sixth Amendment's Confrontation Clause. *Crawford*, 541 U.S. at 68. Admission of testimonial hearsay without the ability to confront the witness at trial and without prior opportunity for cross-examination does offend the Confrontation Clause. *Id.* When an individual, other than the defendant herself, exercises the Fifth Amendment right not to testify, the individual is considered unavailable for Confrontation Clause purposes. Bailey v. Commonwealth, 749 S.E.2d 544, 550 (Va. Ct. App. 2013). Thus, statements made by an individual other than the defendant who pleads the Fifth Amendment may only be admitted if the defendant had a prior opportunity for cross-examination of the witness, or their statements are non-testimonial in nature. *See id.*; *Crawford*, 541 U.S. at 68.

Prior to *Crawford*, *Roberts* controlled the courts' analysis of the Confrontation Clause by outlining a reliability test for admissible testimony. Ohio v. Roberts, 448 U.S. 56, 57 (1980). Notably, the *Crawford* Court only overturned the reliability test in *Roberts* which determined if admission of hearsay violated the Confrontation Clause. *See Crawford*, 541 U.S. at 68. Therefore, in analyzing whether the statements in question are testimonial or non-testimonial, this Court can rely upon longstanding case precedent discussing the context surrounding co-conspirator statements.

Under *Crawford*, courts must decide whether the statements were testimonial or non-testimonial in nature at the time the declarant stated them. The Supreme

Court has guided courts to "consider the extent to which the [declarant] was 'free from any desire, motive, or impulse . . . either to mitigate the appearance of his own culpability by spreading the blame [to the defendant] or to overstate [the defendant's] involvement in retaliation." Rankins v. Commonwealth, 523 S.E.2d 524, 532 (Va. Ct. App. 2000). Testimonial statements are typified as those made in contemplation of trial—those statements made to law enforcement officers. *Crawford*, 541 U.S. at 36, 51. Testimonial statements are those which "declarants would reasonably expect to be used prosecutorially." *Id.* at 51. Conversely, non-testimonial statements are those not made in contemplation of trial, such as "business records or statements in furtherance of a conspiracy." *Id.* at 36. Oral statements not made with the purpose "of establishing or proving some fact" for trial, such as private statements, are non-testimonial. *See* Davis v. Washington, 547 U.S. 813, 826 (2006) (citing *Crawford*, 541 U.S. at 51). Thus, unless Stamper reasonably expected that the private statements he made to his girlfriend inside her apartment would later be used prosecutorially, then the Confrontation Clause is not implicated. *See Crawford*, 541 U.S. at 51.

The following statements by Stamper to his girlfriend are non-testimonial. Stamper merely came clean to his girlfriend, leading with "I want to tell you the truth. I killed her." To explain why he participated in the murder, Stamper stated to his girlfriend, "Frank offered me $20,000 to kill the victim."

Stamper then began describing the events of Barnes' murder to his girlfriend in anticipation of cleaning his conscience. Stamper told his girlfriend the frantic story, "I was wearing 2 pair [sic] of blue latex gloves and the ones on the right hand ripped."

In an attempt to paint his co-conspirators as the true murderers, Stamper blamed others stating to his girlfriend, "Claire told me to go back upstairs and break her neck." Stamper continued in relieving his conscience to his girlfriend by saying, "I went back up and hit her in the head again. I got blood in my mouth and spit it out on the carpet upstairs."

Stamper ended his private confession by informing his girlfriend that he had the intent of coming clean previously, too, stating "There is a confession letter in the truck in my wallet."

The statements made by Frank Underwood to law enforcement squarely fall within testimonial hearsay. *See id.* Because Underwood intends to plead the Fifth, admission of his statements would violate the Confrontation Clause. *See id.* at 68. Similarly, the statements made on October 15, 2019, by Stamper to law enforcement after he received *Miranda* warnings are testimonial. *See id.* at 36. Because Stamper intends to plead the Fifth, admission of his statements *to law enforcement* would violate the Confrontation Clause. *Id.* at 68.

The statements made on September 15, 2019, by Stamper *to his girlfriend* are dissimilar to his statements made on October 15, 2019. Unlike his statements made to law enforcement, the statements Stamper made to his girlfriend are non-testimonial in nature. A reasonable observer would not believe that Stamper, while speaking to his long-term girlfriend, in confidence, inside her home, would be speaking in contemplation of trial.

Stamper spoke to Posner as his girlfriend and not in her capacity as a police informant. Stamper's statements are merely those of a man coming clean to his significant other, under no guise of privilege, without knowing her separate capacity as a police informant.

Ultimately, Stamper's statements to his girlfriend were in the hopes of freeing his guilty conscience. Stamper's statements are those of a man speaking privately to his significant other. For this to be a testimonial statement, Stamper had to have believed his statements to his girlfriend would achieve the same ends as his statements to law enforcement. Thus, the Court should find these statements are non-testimonial in nature with no potential for violating the Confrontation Clause and admit his statements.

II. Because the Declarant Knowingly Made Statements Against Interest That are Corroborated by Other Evidence, His Statements Should Be Admitted.

The *Crawford* Court merely set out a new Confrontation Clause analysis, overturning the *Roberts* reliability test. *Id.* Thus, case precedent from the *Roberts*-era may still be relied upon for a hearsay analysis. *Id.*

The statement against interest hearsay exception is "a firmly rooted hearsay exception" under Virginia law. Lilly v. Virginia, 527 U.S. 116, 135 (1999). The exception requires the witness-declarant be unavailable to testify. Lilly I, 499 S.E.2d 522, 533 (Va. 1998). Further, the exception requires that the statement be an actual admission of wrongdoing, which the declarant made while aware of the inculpating nature of the statement. *Id.* Given the unavailability of the witness-declarant, the

statement must also be reliable. *Id.* at 534. The reliability of a statement may be shown by a multitude of factors, including corroborating physical evidence and corroborating testimony by co-conspirators. *Id.* at 534–35.

a. Stamper is an unavailable witness.

To satisfy the statement against interest hearsay exception, Stamper must be an unavailable witness. VA. CODE ANN. § 8.01-397 (West 2020). A witness who exercises her Fifth Amendment privilege from self-incrimination is unavailable in the eyes of Virginia courts. Bailey v. Commonwealth, 749 S.E.2d 544, 549 (Va. Ct. App. 2013). Stamper intends to invoke his Fifth Amendment right, and thus, is an unavailable witness.

b. Stamper spoke to Posner while aware that his admissions of wrongdoing were inculpating.

The subject matter of Stamper's statements shows a purposeful admission of wrongdoing. For hearsay to satisfy the statement against interest exception, "it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein." *Lilly I*, 499 S.E.2d at 533. Rather, the Court should base admissibility of the statement "upon the subjective belief of the declarant that he [was] making admissions against his penal interest." *Id.*

Stamper came clean to Posner while aware of the open murder investigation because police had previously interviewed him on two separate occasions. Still, before Stamper decided to unveil his murderous actions to Posner, he first denied to her his involvement in the murder. The same day of these denials, Stamper returned to Posner's residence to purposefully confess, fully aware of the inculpating nature.

c. Physical evidence and testimony corroborate Stamper's statements.

Stamper's statements are reliable. Reliability may be based off corroborating co-conspirator testimony, "and upon other evidence tending to show that the statement is reliable." *Id.* at 533–34. The Supreme Court reasoned in *Dutton* that circumstances which tended to show that the declarant "had no apparent reason to lie to" the listener also bolstered reliability. Dutton v. Evans, 400 U.S. 74, 89 (1970).

Stamper speaking to his girlfriend is like the conversation in *Dutton* because it involves statements made by a declarant with no reason to lie given the relationship to the listener. *See id.* Further, Stamper's statements are corroborated by physical evidence. Stamper stated he wore blue latex gloves while killing Barnes. Police recovered pieces of blue latex consistent with having been part of a glove on Stamper's driveway while there to interview him, and also underneath the victim's body. Stamper's statements are corroborated by co-conspirator testimony from Frank Underwood. Underwood told police "that during the course of the murder, [Stamper] got blood in his mouth and had to spit it out in the hall outside of the bedroom." Underwood's statement matches what Stamper vented to Posner, giving further reliability. Thus, the Court should admit Stamper's statements because they satisfy the statement against interest hearsay exception.

CONCLUSION

The Court should admit the out of court statements made by Doug Stamper on September 15, 2019. A court cannot admit hearsay that is testimonial in nature unless the defendant has an opportunity for cross-examination. Crawford v.

Washington, 541 U.S. 36, 59 (2004). However, when a statement is non-testimonial in nature, the court may admit that statement even if the declarant-witness is unavailable, such as by exercising their Fifth Amendment right. *See id.*; Bailey v. Commonwealth, 749 S.E.2d 544, 550 (Va. Ct. App. 2013). Stamper made these statements pertaining to Zoe Barnes' murder to his girlfriend, Rachel Posner, privately in her home. Thus, these statements are non-testimonial.

Because these non-testimonial statements are hearsay, they must still satisfy a hearsay exception in order to be admitted. Virginia courts have long accepted the statement against interest hearsay exception. *See Lilly I*, 499 S.E.2d at 533. Stamper made his inculpating statements while aware of an ongoing investigation, and physical evidence corroborates these statements making his statements reliable. VA. CODE ANN. § 8.01-397 (West 2020). As such, the statement against interest hearsay exception is satisfied and this Court should admit the non-testimonial statements of Doug Stamper.

Respectfully submitted,

/s/ Tessa Tigar-Cross
Tessa R. Tigar-Cross
Commonwealth's Attorney
trtigarcross@email.wm.edu

Applicant Details

First Name	**Jesse**
Middle Initial	**B**
Last Name	**Trujillo**
Citizenship Status	**U. S. Citizen**
Email Address	**jbtrujil@lawnet.uci.edu**
Address	**Address** Street **6836 Savoie Ct.** City **West Jordan** State/Territory **Utah** Zip **84084** Country **United States**
Contact Phone Number	**8018644716**

Applicant Education

BA/BS From	**Reed College**
Date of BA/BS	**May 2016**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 8, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**UC Irvine Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Leslie, Christopher
cleslie@law.uci.edu
949-824-5556

Tutt, Stacey
stutt@law.uci.edu
(949) 824-3761

Shaffer, Gregory
gshaffer@law.uci.edu
(949) 824-4794

References

Christopher Leslie
University of California, Irvine School of Law
Chancellor's Professor of Law
401 East Peltason Drive
Law 4500-G
Irvine, CA 92697-8000
(949) 824-5556
cleslie@law.uci.edu

Relationship: I was a student in Professor Leslie's Contracts course.

Stacey Tutt
University of California, Irvine School of Law
Visiting Clinical Professor of Law
401 East Peltason Drive
Law 4800T
Irvine, CA 92697-8000
(949) 824-3761
stutt@law.uci.edu

Relationship: Ms. Tutt supervised the majority of my work with the Consumer Law Clinic.

Ari Freilich
Giffords Law Center
State Policy Director
268 Bush Street #555
San Francisco, CA 94104
(415) 433-2062
afreilich@giffords.org

Relationship: Mr. Freilich supervised the majority of my work with Giffords Law Center.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jesse B. Trujillo

6836 Savoie Court, West Jordan, UT 84084 | 801.864.4716 | jbtrujil@lawnet.uci.edu

June 9, 2021

The Honorable Elizabeth W. Hanes
Magistrate Judge
United States District Court, Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a second-year student at the University of California, Irvine School of Law and I will graduate in May 2022. I am writing to express my interest in clerking in your chambers for the 2022–23 term, or for any term thereafter. I would be honored to assist in the work of your chambers. I believe that my academic record and work experience show that I will be a productive addition to your chambers and that I possess the requisite attention to detail, work ethic, and exceptional writing ability required to succeed as your clerk.

My education and legal experiences, specifically my strong legal research and writing skills, equip me to succeed as your clerk. I have received three Dean's Awards for my writing in the following classes, respectively: Jurisprudence, International Trade and Investment Law, and AI and the Law. Last summer, I improved my legal research skills by researching complex state and federal issues, and refined my analytical skills by synthesizing and drafting memoranda. To continue improving my legal research and writing this year, I am a research assistant for Chancellor's Professor of Law and Political Science Gregory Shaffer and a Staff Editor on the UC Irvine Law Review. These positions provide me many opportunities to read others' legal writing and assess the strengths and weaknesses of their writing and, in turn, my own. The ability to critique legal writing will help me produce clear, cohesive, and persuasive work as your clerk, as I incorporate the techniques I encounter as an editor. Cumulatively, these experiences have and will prepare me to be an asset in your chambers; I am dedicated to improving my strong foundation in legal research and writing, all while being sensitive to strict deadlines, conducting efficient research, and completing precise work product.

Finally, my education and legal experiences have solidified my interest in civil litigation. After working at UCI's Consumer Law Clinic, I saw first-hand what civil litigation practice entails and would be excited to be a part of it as a clerk. I enjoy the rigorous and time-sensitive nature of the work and am drawn to the academic dexterity required to research and create work product on complex legal issues. I developed these litigation skills as a clinical student, where I managed competing deadlines on various projects. Additionally, I will improve my litigation skills as a summer associate at Geraci, LLP next summer. I am extremely interested in your chambers' work and am confident in my ability to complete it at a high level of aptitude.

Enclosed are my resume, law school transcript, writing sample, and letters of recommendation from Professors Gregory Shaffer, Christopher Leslie, and Stacey Tutt. I welcome the opportunity to interview with you and can be reached at (801) 864-4716 or jbtrujil@lawnet.uci.edu. Thank you for your time and consideration.

Sincerely,

Jesse B. Trujillo

Jesse B. Trujillo

6836 Savoie Court, West Jordan, UT 84084 | 801.864.4716 | jbtrujil@lawnet.uci.edu

EDUCATION

University of California, Irvine, School of Law, Irvine, CA
Juris Doctor Candidate, May 2022, GPA 3.478
Honors: Dean's Award (second highest performance in course): Jurisprudence, International Trade and Investment Law, AI & the Law
Pro Bono Achievement Award
Activities: *UC Irvine Law Review*, Staff Editor, 2020 – Present
First Generation Professionals, National Lawyers Guild Legal Observer, Public Interest Law Fund, Summer Mentor
Pro Bono: American Constitution Society Federal Watchdog Project, Orange County Court Watch, Orange County Clean Slate Clinic

Reed College, Portland, OR
Bachelor of Arts Degree in Philosophy, May 2016
Activities: Multicultural Scholars Program, Philosophy Club, Student Manager

LEGAL EXPERIENCE

Geraci, LLP, Irvine, CA May 2021 – Present
Summer Associate. Under supervision of partners and senior associates, draft pleadings, motions, and discovery including complaints, demurrers, motions to strike, motions for summary judgment, interrogatories, and requests for production of documents.

University of California, Irvine, School of Law, Irvine, CA May 2021 – Present
Research Assistant to Professor Gregory Shaffer. Work closely with professor on various book and article projects on international law. Research relevant case and law and provide analysis and feedback on writing.

Giffords Law Center to Prevent Gun Violence, San Francisco, CA May 2020 – July 2020
Legal Intern. Worked closely with attorneys to draft legislation, research relevant case law, and provide analysis on issues of gun violence. Drafted memoranda, amicus briefs, and other policy reports addressing federal and state law.

University of California, Irvine School of Law, Irvine, CA August 2020 – December 2020
Consumer Law Clinical Student. Represented clients exploited by predatory lending practices, researched and drafted memoranda on consumer protection claims under California's Unfair Competition Law and other deceptive business practices.

Orange County Clean Slate Clinic – Expungement Project, Santa Ana, CA September 2019
Pro Bono Volunteer. Interviewed clients and helped prepare petitions for the court to expunge clients' records of misdemeanor offenses.

EMPLOYMENT

Custom Medical Solutions, West Valley, UT August 2018 – August 2019
Customer Service Representative. Responsible for delivering medical supplies to patients and facilities in need, managing client accounts, assisting nurses with patient care services, and managing warehouse inventory.

INTERESTS

Interests include reading, writing, basketball, film, politics, and travel.

Notice on the Accellion Data Breach

Trujillo, Jesse B. (37499498)
LAW (SCHOOL OF LAW)

Your transcript below is not official and is informational only. It is not for use as a verification of enrollment.

Official transcripts, verifications of enrollment, or other records may be requested from the University Registrar. Refer to the Services section on our website.

(Printer-Friendly)
********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

Previous Degrees

B.A. 05/16 REED COLLEGE

Memoranda

DUE TO COVID-19, SPR2020 LAW GRADES REQD S/U

EXCEPTION: SHORT SESSN & WTR QTR GRADES POST

PRO BONO - 1L ACHIEVEMENT (20+ HRS) - 2019-20

LAW 568 - DEANS AWARD - FALL 2020

LAW 555 - DEANS AWARD - SPRING 2021

LAW 5909 - DEANS AWARD - SPRING 2021

2019 Fall Semester

STATUTORY ANALYSIS	LAW	503	3.0	B+	9.9	
PROCEDURAL ANALYS	LAW	504	4.0	B	12.0	
LAWYERING SKILLS I	LAW	506A	3.0	B-	8.1	
LEGAL PROFESSION I	LAW	507A	2.0	S	0.0	SU
LEGAL RESEARCH PRAC	LAW	508	1.0	S	0.0	SU
COM LAW: CONTRACTS	LAW	500	4.0	A-	14.8	

Term Totals **ATTM: 14.0 PSSD: 14.0 GPTS: 44.8 GPA: 3.200**

Cumulative Totals **ATTM: 14.0 PSSD: 14.0 GPTS: 44.8 GPA: 3.200**

2020 Spring Semester

COMMON LAW: TORTS	LAW	501	4.0	S	0.0	SU
LAW SKILLS II	LAW	506B	3.0	S	0.0	SU
LEGAL PROFESSION II	LAW	507B	2.0	S	0.0	SU
INT'L LEG ANALYSIS	LAW	505	3.0	S	0.0	SU
CON ANALYSIS	LAW	502	4.0	S	0.0	SU